

N. 3003

No. 14982

United States
Court of Appeals
for the Ninth Circuit

R. P. HILL and MARY HILL, Appellants,

vs.

A. E. WAXBERG, doing business as Waxberg
Construction Company, Appellee.

Transcript of Record

Appeal from the District Court for the District of Alaska,
Fourth Division

FILED

APR - 9 1956

PAUL P. O'BRIEN, CLERK

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R. P. HILL and MARY HILL, Appellants,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Attorney for Appellee.

In the District Court for the District of Alaska,
Fourth Division

No. 6481

A. E. WAXBERG, d/b/a Waxberg Construction
Company, Plaintiff,

vs.

R. P. HILL and MARY HILL,
Defendants.

SECOND AMENDED COMPLAINT

Now comes the plaintiff and for causes of action
against the defendants, alleges and says:

First Cause of Action

The plaintiff for his first cause of action against
the defendants, alleges as follows:

I.

That plaintiff is a general contractor and in the
building construction business in Fairbanks, Alaska,
and that he, together with the defendants, are
residents of Fairbanks, Fourth Division, Territory
of Alaska, and within the jurisdiction of this Court.

II.

That on or about the 16th day of January, 1950,
plaintiff and defendants entered into an oral contract
whereby plaintiff agreed to construct a building,
under Section 608 of the Federal Housing Act
and Administrative Rules and Regulations as pro-

vided in the laws of the United States, for defendants to be known as Second and Lacey Street Apartments in Fairbanks, Alaska, within fourteen months; that on or about the 2nd day of February, 1950, plaintiff in accord with said oral contract agreed to construct said building for defendants at a cost of \$1,694,374.00 which offer was accepted by the defendants and plaintiff was instructed by defendants to proceed to do all things necessary to carry out the terms of said contract.

III.

That plaintiff carried out and performed all of his duties, obligations and agreements under said contract to be kept and performed, but defendants without notice to plaintiff, proceeded to rescind the said oral agreements on or about the 4th day of May, 1950, by securing other sponsors, architects and contractors for the construction of said building and commencing work on said building with said new sponsors, architects and contractors, thereby causing the breach and rescission of the oral contract and agreements between plaintiff and defendants, despite the fact that plaintiff has been, and is, ready, willing and able to carry out all of the terms of said contract and agreements.

IV.

That by reason of the defendants abandonment and breach of said contract and agreements with plaintiff, notwithstanding plaintiff's part performance, plaintiff has been damaged in a sum repre-

senting the difference between the agreed contract price for construction in the sum of \$1,694,374.00 and the cost of the construction in the sum of \$1,-643,374.00, or the reasonable contractors profit of \$50,826.00 for preliminary costs, supervision, and construction, which sum plaintiff ought, as he believes, to recover from defendants.

V.

That it has become necessary for plaintiff to employ an attorney to bring this action and plaintiff believes that he should recover a reasonable fee for his said attorney.

Second Cause of Action

Comes now the plaintiff and for a second and alternative cause of action against defendants alleges and says:

I.

Re-pleads paragraph I of plaintiff's first cause of action, by reference, as though set out in full again.

II.

That after numerous preliminaries, on or about the 16th day of January, 1950, plaintiff and defendants entered into an oral agreement with plaintiff whereby plaintiff was engaged to build and construct a building for defendants to be known as the Second and Lacey Street Apartments, in Fairbanks, Alaska, at the fair, reasonable and agreed sum of \$1,694,374.00, and to do all things necessary to effect the premises; and pursuant to said agreement,

plaintiff proceeded to make preliminary investigation surveys and soundings of Lots 1, 2, and 3 of Block 12, the property on which said building was to be constructed expending 14 days of plaintiff's time on such work connected with estimate and preliminary matters, consulting with the Philleo Engineering Service, City Utilities, and others, and employed and paid Williams Equipment Company the sum of \$470.00 for taking soundings on said property for footings for the proposed building, and performed other acts necessary to the agreement between the parties hereto.

III.

That the parties hereto decided to construct said building under a loan under Section 608 of the Federal Housing Act and the Administrative Rules and Regulations thereof and defendants requested plaintiff to continue with the contract and preliminary work necessary to secure said loan and to prepare for construction, whereupon plaintiff employed and paid L. Orsini \$500.00 to prepare financial statements and other papers necessary to meet FHA requirements and did employ and pay R. J. McNealy, attorney, the sum of \$200.00 for legal services in connection with plaintiff's agreement aforesaid.

IV.

That in connection with said agreement, plaintiff accompanied the defendant, R. P. Hill, to Seattle, Washington, on January 29, 1950, and consulted with banking houses and officers of the FHA for

the defendants until February 2, 1950, when plaintiff took a plane to Juneau, Alaska, to consult with the FHA Administrator for Alaska on behalf of defendants for a period of two days before returning to Fairbanks, Alaska, on February 5, 1950, making a total of eight days of plaintiff's time spent in service of defendants; that on said trip the plaintiff's hotel bill was \$25.00, meals and taxi service amounted to \$64.00 and the sum of \$217.35 for transportation on Pan American Airways.

V.

That in connection with said agreement, plaintiff again traveled to Seattle, Washington, on the 1st day of March, 1950, and was engaged for a period of 16 days on behalf of defendants with banks, architects, FHA officials and materialmen, returning to Fairbanks, Alaska, on the 16th day of March, 1950, having paid out \$166.51 for hotel bills, including phone charges with reference to defendants work, the sum of \$128.00 for meals and taxi service and the sum of \$217.35 to Pan American Airways for plane transportation on said trip.

VI.

That according to plaintiff's information and belief, the defendant, R. P. Hill, was not in Fairbanks, Alaska, on May 4, 1950, at which time plaintiff was informed that defendants were securing other contractors to construct the proposed building and plaintiff again flew to Seattle, Washington, on May 4, 1950, and consulted with banks, archi-

pects, FHA officials and contractors with reference to the proposed apartment building and after five days learned that the defendants had notified architects, contractors, and the FHA, that plaintiff was no longer connected with him and that defendants had broken, canceled and abandoned the contract with plaintiff; that plaintiff's expenses on said trip of five days were: Hotel bills—\$37.59, meals and taxi service—\$40.00, and the sum of \$217.35 for plane fare via Pan American Airways.

VII.

That defendants have revoked and rescinded their agreement with plaintiff, and as a result thereof, the contract with plaintiff has been breached by defendants, notwithstanding that plaintiff done, kept, and performed all of the obligations and conditions that he was obliged to do and perform under the contract with defendants and further notwithstanding that plaintiff is still ready, willing and able to perform under the original contract, save that by delay of defendants, time for performance would have to be extended, and as a result of defendant's wrongful breach of said contract the plaintiff has been damaged in the sum of \$4,300.00 representing 43 days time spent in service of defendants, being the going wage at the fair and reasonable sum of \$100.00 per day charged by contractors for such services in and about Fairbanks, Alaska; airplane fare of \$652.05; the sum of \$229.10 for hotel and phone bills; the sum of \$232.00 for meals and taxi services; the sum of \$470.00 paid to Williams

Equipment Co.; the sum of \$500.00 paid to L. Orsini; and the sum of \$200.00 paid to R. J. McNealy, attorney, all of which totals \$6,583.15, which sum plaintiff ought as he believes to recover from defendants, for the reason that defendants benefited by, and took advantage of, plaintiff's labor, services and money expended under said contract.

VIII.

That it has become necessary for plaintiff to employ an attorney to bring this action and plaintiff believes that he should recover a reasonable fee for his said attorney.

Third Cause of Action

Plaintiff, for his third and alternative cause of action against defendants, alleges:

I.

Re-pleads paragraph I of plaintiff's first cause of action, by reference, as though set out in full again.

II.

Re-pleads paragraph II of plaintiff's second cause of action, by reference, as though set out in full again.

III.

Re-pleads paragraph III of plaintiff's second cause of action, by reference, as though set out in full again.

IV.

Re-pleads paragraph IV of plaintiff's second

cause of action, by reference, as though set out in full again.

V.

Re-pleads paragraph V of plaintiff's second cause of action, by reference, as though set out in full again.

VI.

Re-pleads paragraph VI of plaintiff's second cause of action, by reference, as though set out in full again.

VII.

That if plaintiff is denied the right to recover from defendants under his first or second cause of action, then as an further alternative, plaintiff should recover from defendants quantum meruit for the reasonable value of services performed by him as part performance under said agreement with plaintiff and in addition thereto to be allowed his expenses in the sum of \$2,283.15.

VIII.

That it has become necessary for plaintiff to employ an attorney to bring this action and plaintiff believes that he should recover a reasonable fee for his said attorney.

Wherefore, plaintiff prays judgment against defendants as follows:

1. For the sum of \$50,826.00 on plaintiff's first cause of action, or
2. For the sum of \$6,583.15 on plaintiff's second and alternative cause of action, or

3. For judgment Quantum Meruit for services rendered defendants, plus the sum of \$2,283.15 expenditures, on plaintiff's third and alternative cause of action.

4. For plaintiff's costs and disbursements, including a reasonable fee for his attorney.

/s/ R. J. McNEALY,
Attorney for Plaintiff

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed November 21, 1951.

[Title of District Court and Cause.]

AMENDED ANSWER

Comes Now, the named Defendants and for Amended Answer to Plaintiff's Second Amended Complaint, admit and deny as follows:

For Answer to Plaintiff's First, Second and Third Causes of Action:

First Defense

That there was never a contract or other agreement between the Plaintiff and Defendants wherein Defendants, or either of them, agreed to pay to the Plaintiff money for the construction of a building in Fairbanks, Alaska, or for the payment by Defendants to Plaintiff money for services rendered or to be rendered by Plaintiff, or any person, firm

or corporation, for or in behalf of Defendants, or either of them.

Second Defense

That any agreement made by Defendants or either of them to pay money to Plaintiff for the construction of a building in Fairbanks, Alaska, or for any other reason or purpose, if such an agreement there was, is void and unenforceable on the grounds and for the reason that same was gratuitous and without consideration.

Third Defense

That no written contract, note or other memorandum for the construction of a building was ever executed between Plaintiff and Defendants or either of them, and subscribed by said persons, and that said contract, if contract there was, was not to be performed, nor intended to be performed, within one year from the making thereof and that such contract or agreement is therefore void as provided by Section 58-2-2 (1) ACLA, 1949.

Fourth Defense

That any time, energy, effort or money expended by the Plaintiff herein were not expended at the instance or request of Defendants, or either of them, in accordance with any contract or other agreement, but such expenditure of time, energy effort or money was expended by Plaintiff at Plaintiff's risk in an effort to secure, and preliminary to securing a contract or other agreement between Plaintiff and Defendants for the construction of a building in Fairbanks, Alaska under an FHA commitment.

Fifth Defense

That Plaintiff performed no service of value to Defendants, or either of them.

Sixth Defense

That Defendants, nor either of them, ever promised or agreed to pay unto Plaintiff any sum of money, nor did Defendants, or either of them, request Plaintiff to perform any service or to secure the performance of any service for them, or the employment of any person, firm or corporation, nor did Defendants, or either of them, request Plaintiff to expend any money, time, energy or effort in their behalf; nor did Defendants, or either of them, authorize the expenditure of Plaintiff's money for or in behalf of Defendants, nor did Defendants, or either of them agree at any time to reimburse Plaintiff for any such expenditure, or expenditures.

Seventh Defense

That the time, energy, effort and money expended by the Plaintiff were normal incidents of the building construction business and such expenditures were no different in character than those performed by any building construction contractor preliminary to, and in an effort to secure a contract for the construction of a large building involving one and three-quarter million of dollars.

Eighth Defense

That as a condition precedent to the commencement of construction of all FHA projects the said

FHA requires the execution of building construction contractor's performance bond, which bond the Plaintiff herein was unable to secure, the posting of such performance bond being also a condition precedent upon which depended Defendants' duty to perform any agreement between Plaintiff and Defendants, or either of them.

Ninth Defense To
Plaintiff's First Cause of Action:

I.

Defendants admit the allegation of Paragraph I.

II.

Defendants deny each material allegation of Paragraph II.

III.

Defendants deny each material allegation of Paragraph III.

IV.

Defendants deny each material allegation of Paragraph IV.

V.

Defendants deny each material allegation of Paragraph V.

Ninth Defense To
Plaintiff's Second Cause of Action:

I.

Defendants admit the allegations of Paragraph I.

II.

Defendants deny each material allegation of Paragraph II.

III.

Being without sufficient information upon which to form a belief Defendants deny that Plaintiff employed L. Orsini and R. J. McNeally, Defendants deny each and every other material allegation in Paragraph III.

IV.

Defendants deny each material allegation in Paragraph IV.

V.

Defendants deny each material allegation in Paragraph V.

VI.

Being without sufficient information upon which to form a belief, Defendants deny each material allegation in Paragraph VI.

VII.

Defendants deny each material allegation of Paragraph VII.

VIII.

Defendants deny each material allegation of Paragraph VIII.

Ninth Defense To
Plaintiff's Third Cause of Action:

I.

Defendants admit the allegations of Paragraph I.

II.

Defendants deny each material allegation of Paragraph II.

III.

Defendants deny each material allegation of Paragraph III.

IV.

Defendants deny each material allegation of Paragraph IV.

V.

Defendants deny each material allegation of Paragraph V.

VI.

Defendants deny each material allegation of Paragraph VI.

VII.

Defendants deny each material allegation of Paragraph VII.

VIII.

Defendants deny each material allegation of Paragraph VIII.

Wherefore having fully answered, Defendants pray that Plaintiff take nothing on his Complaint on file herein.

/s/ ROBERT A. PARRISH,

Of Attorneys for Defendants

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed September 24, 1952.

[Title of District Court and Cause.]

THIRD AMENDED COMPLAINT

Plaintiff complains of defendants and alleges:

I.

That plaintiff is a general contractor and in the building construction business in Fairbanks, Alaska, and that he, together with the defendants, are residents of Fairbanks, Fourth Division, Territory of Alaska, and within the jurisdiction of this Court.

II.

That plaintiff and defendants met several times during the month of December, 1949, and on occasions thereafter, and discussed the construction of a business and apartment building on defendants property between First and Second Avenues on Lacey Street in Fairbanks, Alaska, and for the purpose of securing a commitment under Section 608 of the Federal Housing Authority to secure funds with which to do said construction.

III.

That plaintiff and defendants agreed that plaintiff was to construct said building, if and when a F.H.A. commitment was secured and after necessary plans and specifications were prepared to determine cost of construction.

IV.

That pursuant to said discussions and agreement and at the request of defendants plaintiff became a

co-sponsor on an application for the F.H.A. commitment for a loan to construct said building, and proceeded to do the other necessary and preliminary work in furtherance thereof.

V.

That in connection therewith, early in January of 1950 plaintiff employed L. Orsini to prepare the necessary statements and preliminary papers to make application for the F.H.A. commitment, which service was successfully performed and plaintiff paid the said Orsini the sum of \$500.00 therefor.

VI.

That in order to supply the architects employed by defendants with preliminary information on which to base plans and specifications for the F.H.A. commitment and later construction, plaintiff employed the Philleo Engineering Service to survey defendants' lots and employed Williams Equipment Company to take soundings for footings and foundations for the proposed building and plaintiff paid said Williams Equipment Company the sum of \$470.00 for their services in this connection.

VII.

That in connection with services performed on behalf of defendants, the plaintiff spent 43 days of his time on said preliminary work and plans, making three or four trips to Seattle and one trip to Juneau via Pan American Airlines on behalf of said project at a total cost of \$626.88 in airplane

fare, and the sum of \$220.10 for hotel expenses, which time, travel and expense was incurred for defendants' benefit by plaintiff doing preliminary work in Fairbanks, and consulting with banks, materialmen, F.H.A. officers and architects in Seattle, Washington, and making one trip to Juneau, Alaska, at request of defendants.

VIII.

That as the direct result of all of plaintiff's efforts, services and expenditures, an F.H.A. commitment under Section 608 was issued on the 24th day of February, 1950, just prior to expiration of this type of loan guarantee in Alaska, and plaintiff and defendants were named as sponsors on said commitment.

IX.

That for a time after said commitment was issued plaintiff continued to work on preliminary plans for the construction of said building for defendants, but prior to the time final plans and specifications were drawn, defendants demanded that plaintiff pay to them \$50,000.00 of the expected builder's profit for constructing said building and upon plaintiff's refusal to so do, defendants severed their connections and association with plaintiff and secured another contractor to construct a building for them, being the present Polaris Building in Fairbanks, Alaska.

X.

That by reason of all of the transactions between the parties and by virtue of defendants failing to

make a contract with plaintiff for a specified sum to construct the building for them, an implied contract exists to pay plaintiff for the reasonable value of his services and expenditures on behalf of defendants as is evidenced by the conversations and actions of the parties in connection with the F.H.A. commitment, preliminary plans, and negotiations for construction.

Wherefore, plaintiff prays the Court that he recover from defendants quantum meruit, the reasonable value of his services and expenditures for defendants benefit, together with a reasonable fee for his attorneys and his costs and disbursements in this action.

EVERETT W. HEPP and
R. J. McNEALY,

/s/ By R. J. McNEALY,
Of Counsel for Plaintiff

Duly Verified.

[Endorsed]: Filed August 3, 1955.

[Title of District Court and Cause.]

DEFENDANTS REQUESTED INSTRUCTIONS

Defendant Requested Instruction No. 1

You are hereby instructed that the Plaintiff is not entitled to a recovery against the defendants in any amount, if he performed services or expended money for the purpose of obtaining business through a hoped for contract.

[In longhand]: Defendants' Requested Instructions 1 to 5, inclusive, are each and all denied. Dated Aug. 4, 1955. Signed Vernon W. Forbes, Judge.

Defendants Requested Instruction No. 2

If, in this case, you find that the services rendered by the Plaintiff or the monies expended by him were as much in his interest or for his benefit as in the interest or for the benefit of the Defendants, and were rendered and expended for the purpose of securing a commitment for insurance, and at the time that such services were rendered or monies were expended that the Plaintiff had no expectation of charging therefore then, and in that event, you must find for the Defendants and against the Plaintiff.

Defendants Requested Instruction No. 3

For the Plaintiff to recover from the Defendants the reasonable value of his services or the amount of monies which he expended, you must have been convinced by a preponderance of the evidence that the services and expenditures of the Plaintiff and the reception thereof by the Defendants were performed and made by the Plaintiff and accepted and received by the Defendants with a mutual understanding by both the Plaintiff and the Defendants that the Defendants were to pay for same.

Defendants Requested Instruction No. 4

If you the Jury believe that the Plaintiff ren-

dered services or expended monies without an expectation of compensation from these defendants, you must find for the Defendants and against the Plaintiff.

Defendants Requested Instruction No. 5

In this case, to find in favor of the Plaintiff and against the Defendants, you must be convinced by a preponderance of the evidence that, at the time the Plaintiff rendered services or expended money, he then expected these Defendants to pay him therefor, and that the services were rendered by the Plaintiff and received by the Defendants under such circumstances as to cause the Defendants to expect that they were to pay therefor.

Acknowledgment of Service attached.

[Endorsed]: Filed August 4, 1955.

[Title of District Court and Cause.]

VERDICT No. I

We, the Jury, duly empaneled and sworn to try the above entitled cause do find for the plaintiff and award damages to the plaintiff in the sum of \$11,067.46.

Dated at Fairbanks, Alaska, this 4th day of August, 1955.

/s/ EDSON W. HARDENBROOK,
Foreman

[Endorsed]: Filed August 5, 1955.

[Title of District Court and Cause.]

MOTION FOR A JUDGMENT NOTWITH-
STANDING THE VERDICT, OR FOR A
NEW TRIAL

Comes Now the above named Defendant R. P. Hill, by and through his Attorney George B. McNabb, Jr., and moves this Honorable Court for a new trial in the above entitled cause, or in the alternative, for a judgment notwithstanding the verdict heretofore rendered in said cause: This motion is based on the following grounds, to-wit:

I.

That the Court erred in overruling Defendant's motion for a directed verdict at the close of the Plaintiff's evidence.

II.

That the Court erred in granting leave to the Plaintiff for the filing of an Amended Complaint subsequent to the Defendant's Motion for a directed verdict.

III.

That the Court erred in refusing Defendant's motion for a directed verdict at the close of the case.

IV.

That the Court erred in refusing each and every and all of the Defendant's requested instructions.

V.

That the verdict of the Jury was contrary to the evidence.

VI.

That the verdict was excessive in amount.

VII.

That there was insufficient evidence to justify the verdict.

VIII.

That the Court erred in refusing to grant the Defendant a continuance after allowing Plaintiff to file an Amended Complaint.

IX.

That the Jury was influenced by passion or prejudice against the Defendant and awarded an excessive verdict.

Dated this 9th day of August, 1955.

/s/ GEORGE B. McNABB, JR.,
Attorney for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed August 9, 1955.

In the District Court for the District of Alaska,
Fourth Division

No. 6481

A. E. WAXBERG, d/b/a Waxberg Construction
Co., Plaintiff,

vs.

R. P. HILL, Defendant.

JUDGMENT

This Cause came on regularly for trial, plaintiff being present in Court and represented by his attorneys, Everett W. Hepp and R. J. McNealy, and defendant being present in Court and represented by his attorney, George B. McNabb, Jr., and a Jury having been duly empanelled and sworn to try the issues in the above-entitled cause, and testimony and evidence having been submitted on behalf of plaintiff and defendant, and arguments of counsel for the respective parties to this action having been made, and the Court having instructed the Jury as to the law in the case, and the Jury having considered the law and the evidence duly returned into Court their Verdict of the 4th day of August, 1955, as a sealed Verdict on the 5th day of August, 1955, as provided by stipulation of the respective attorneys, and in words and figures, together with later endorsements thereon, as follows:

Filed in the District Court, Territory of Alaska,
4th Div., August 5, 1955.

John B. Hall, Clerk

Verdict No. I.

We, the Jury, duly empaneled and sworn to try the above entitled cause do find for the plaintiff and award damages to the plaintiff in the sum of \$11,067.46.

Dated at Fairbanks, Alaska, this 4th day of August, 1955.

/s/ Edson W. Hardenbrook, Foreman

August 5, 1955 Entered in Court Journal No. 52
Page 189.

It further appearing that plaintiff on the 24th day of April, 1951, caused all of the right, title and interest of defendant, in and to Lots 1, 2 and 3 of Block 12 of the Townsite of Fairbanks, Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, to be attached in this cause by the United States Marshal for the Fourth Division, District of Alaska, in the sum of \$6,583.15, and on the 18th day of May, 1951, plaintiff instructed said marshal to release from said attachment all of said realty except the following described real property situated in the Townsite of Fairbanks, Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, and more particularly described as:

That portion of Lots one (1) and two (2) of Block Twelve (12), being the Hill Cocktail Bar more fully described as:

Beginning at the SE corner of Lot 2, Block 12, of the Fairbanks Townsite, said point being the SE corner of the building; thence appx. N 8°16' W a distance of about 75 feet to the NE corner of said building; thence appx. S 81°44' W a distance

of about 45 feet to the NW corner of the building; thence about S 8°16' East a distance of 4 feet; thence about N 81°44' E a distance of 3 feet; thence in a southerly direction about 66 feet to the SW corner of the building being on the North side of Second Avenue about 39 feet westerly from the SE corner of said Lot 2; thence N 82°15' E along Second Avenue to point of beginning.

That return of the attachment writ was made by said marshal on the 27th day of June, 1951, and except as aforesaid, said attachment has not been released.

Now, Therefore, in accordance with the Verdict of the Jury, it is hereby

Ordered, Adjudged and Decreed that plaintiff have and recover from defendant the sum of \$11,-067.46, and the sum of \$700.00 as fees for plaintiff's attorneys, together with his costs and disbursements in the sum of \$43.00 as taxed by the Clerk of this Court, said Judgment to draw interest at the rate of 6 per centum per annum from the date hereof, and it is

Further Ordered, Adjudged and Decreed that plaintiff may cause the right, title and interest of the defendant in and to the above described real property held under attachment by the United States Marshal for the Fourth Division, District of Alaska, to be sold according to law to satisfy plaintiff's demands to the extent of \$6,583.15, and if execution issue on this Judgment, the overplus after satisfaction of such execution shall be delivered to the defendant.

Done at Fairbanks, Alaska, this 3rd day of October, 1955.

/s/ VERNON D. FORBES,
District Judge

Acknowledgment of Service attached.

[Endorsed]: Filed October 3, 1955.

[Title of District Court and Cause.]

ORDER

The Court having considered the matters in the defendants' Motion for a Judgment notwithstanding the Verdict and Motion for a New Trial and now being fully advised in the premises, it was Ordered that the Motions be denied.

Entered in Court Journal Oct. 4, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Defendants above-named, R. P. Hill and Mary Hill, hereby appeal to the United States Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, from the judgment entered in this action on the 3rd day of August, 1955, and from the order entered on October 4, 1955, denying Defendants' motion for a new trial.

Dated at Fairbanks, Alaska, this 17th day of October, 1955.

/s/ GEORGE B. McNABB, JR.,

Attorney for Defendants

Acknowledgment of Service attached.

[Endorsed]: Filed October 19, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Appellant states the following points upon which he will rely on Appeal.

1. That the Court erred in overruling Defendant's motion for a directed verdict at the close of the Plaintiff's evidence.

2. That the Court erred in granting leave to the Plaintiff for the filing of an Amended Complaint subsequent to the Defendants' Motion for a directed verdict.

3. That the Court erred in refusing Defendants' motion for a directed verdict at the close of the case.

4. That the Court erred in refusing each and every and all of the Defendants' requested instructions.

5. That the verdict of the Jury was contrary to the evidence.

6. That the verdict was excessive in amount.

7. That there was insufficient evidence to justify the verdict.

8. That the Court erred in refusing to grant the Defendants a continuance after allowing Plaintiff to file an Amended Complaint.

9. That the Jury was influenced by passion or prejudice against the Defendants and awarded an excessive verdict.

10. That the trial Court erred in overruling Defendants' Motion for Judgment Notwithstanding the Verdict or For a New Trial.

11. That the Court erred in its instructions to the Jury.

Dated at Fairbanks, Alaska, this 12th day of December, 1955.

/s/ GEORGE B. McNABB, JR.,

Attorney for Defendant Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed December 13, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the following list comprises all proceedings in this cause listed on the defendants' Designation of Record and Additional Designation of Record, viz.:

1. Second Amended Complaint.
2. Amended Answer.
3. Third Amended Complaint.

4. Motion for Judgment, Notwithstanding the Verdict, or For a New Trial.
5. Hearing on above Motions.
6. Order denying above Motions.
7. Notice of Appeal.
8. Verdict No. 1.
9. Statement of Points on Appeal.
10. Designation of Record.
11. Additional Designation of Record.
12. Defendants' Requested Instructions to the Jury.

Witness my hand and the seal of the above-entitled Court this 17th day of December, 1955.

[Seal] /s/ JOHN B. HALL,
 Clerk of the Court

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 6481—Civil

A. E. WAXBERG, d/b/a Waxberg Construction
Co., Plaintiff,

vs.

R. P. HILL, Defendant.

TRANSCRIPT OF PROCEEDINGS

Dates: August 1, 2, 3, and 4, 1955.

Place: Fairbanks, Alaska.

Before: Hon. Vernon D. Forbes, District Judge,
and Jury.

Appearances: Robert J. McNealy and Everett W. Hepp, of Fairbanks, Alaska, attorneys for plaintiff. George B. McNabb, Jr., of Fairbanks, Alaska, attorney for defendant.

Mary F. Templeton, Official Court Reporter. [1*]

Be It Remembered, that at 10:00 a.m., upon the 1st day of August, 1955, the trial of this cause, No. 6481, was begun, plaintiff and defendant represented by counsel, the Honorable Vernon D. Forbes, District Judge, presiding:

The Court: Will the Clerk, please, call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll of the jury.)

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

Clerk of Court: How many does that make, Mrs. Wann?

Bailiff: Thirty-three.

Clerk of Court: Thirty-three present, your Honor. Six absent. I am not too sure they haven't been excused, some of them.

The Court: May I see the list of the absentees.

This is the time fixed for the trial of civil cause 6481, Waxberg vs. R. P. Hill and Mary Hill. Counsel ready to proceed?

Mr. McNealy: Ready, your Honor.

Mr. McNabb: Defendants are ready, your Honor.

The Court: We have a sufficient number of jurors to proceed and both the plaintiff and the defendant ready to proceed with the thirty-three that responded to roll call?

Mr. McNealy: Yes, sir.

The Court: The Clerk will now draw twelve names from the jury box.

(At this time, Mr. McNealy made a brief statement to [3] the veniremen and Mr. McNabb and Mr. McNealy proceeded to impanel a jury.)

(A jury was duly impaneled and sworn to try the above named cause.)

Clerk of Court: The remaining jurors are excused until next Monday morning at ten o'clock.

The Court: Ladies and gentlemen, you have now been selected as jurors to try this case. While no evidence has yet been submitted to you I nevertheless admonish you not to discuss the case with

anyone or among yourselves, and do not form, of course, any opinion until the case is finally submitted to you and you are excused until two o'clock. And counsel will you, please, remain.

(Thereupon, the jury withdrew from the courtroom and the following proceedings were had out of the presence and hearing of the jury):

The Court: Let the record show the presence of the parties and their respective attorneys and the absence of any of the jurors. And, gentlemen, it isn't quite timely but I wonder if you wish to stipulate that in the event of the disability of any of the jurors that a verdict might be returned by eleven?

Mr. McNealy: The plaintiff will so stipulate, your Honor.

Mr. McNabb: The defense will stipulate to that effect.

The Court: Very well, and next, gentlemen, perhaps somewhat in the nature of a pre-trial although the trial is [4] actually commenced in this case, the jury having been selected. I wish that counsel for the plaintiff would enlighten the Court on two or three matters and one is the first cause of action as I understand it from a reading of the second amended complaint is clearly an action for a breach of an alleged contract. And I believe that it is the plaintiff's theory that the contract was for a certain figure and that had the plaintiff been permitted to complete the alleged contract that his profit would have been fifty thousand eight hundred

twenty-six dollars. That is the theory of the first cause of action, Mr. McNealy?

Mr. McNealy: Yes, your Honor, that is.

The Court: And the allegations that the plaintiff has performed all of his duties, obligations and agreements under the contract to be kept and performed, how is the Court to interpret that? The building was built by the plaintiff? I call your attention to Paragraph two of the second amended complaint, Paragraph three on top thereof that plaintiff carried out and performed all of his duties and obligations and agreements under said contract to be kept and performed; that the defendants without notice to plaintiff proceeded to rescind the said oral agreements.

Mr. McNealy: The meaning of that, your Honor, while it may not be as clear as it should be is that he performed all of his preliminary duties in regard, and obligations that were necessary at the, to begin to carry out the contract work, your Honor, and we close the paragraph stating, of course referring [5] back to that time that he was ready, willing and able to carry out all of the contract. We refer merely to the preliminary work that was done.

The Court: Then to assist in the trial, the Court is wondering about paragraph 2 of the second amended complaint, that on or about the 16th day of January, 1950, plaintiff and defendant entered into an oral contract. Now, that refers to an agreement on the 16th day of January, 1950, and later on in the same paragraph, that on or about the 2nd day of

February, 1950, at a cost of so much money, what is the plaintiff's theory in regard to that? The two specific dates alleged in the complaint.

Mr. McNealy: The testimony in support thereof, your Honor, will be that the actual agreement to construct this building was done about the 16th of January and that between the 16th of January and the 2nd of February the plaintiff was required to furnish the cost estimate of the building and in that interim time had prepared his cost estimate which was the only thing, only further step for him to do in regard to the contract at that time, which was to determine the materials and costs that would be required to carry out the contract.

The Court: Is it your theory that that agreement on the 16th day of January, 1950, was the fixed contract between the parties, regardless of how much might be determined later, the cost of the building would be?

Mr. McNealy: Yes, your Honor. [6]

The Court: I mean, if that figure had been three million it was still the agreement of the parties the contract was made on the 16th of January, 1950? I was just wondering about your theory, if there could be a fixed contract before the price had been determined?

Mr. McNealy: Well, I believe that the testimony, your Honor, shows an approximate figure decided upon and on the 16th of January Mr. Hill asked Mr. Waxberg to figure out the exact costs rather than an approximate figure which as I remember, was somewhere around a million and a half dollars

was talked about originally. That is as of the 16th of January.

The Court: Now, for the Court's enlightenment, can you point out to me to assist in the trial of this cause the difference between the second cause of action and the third cause of action. What is the theory of it and, of the second cause, and what is the theory of the third cause?

Mr. McNealy: That, your Honor, goes back to possibly the reason for a second amended complaint being filed. I believe we argued these in prior times before the Court that we would set it up as a second cause of action. However, strictly speaking, it is an alternative cause of action that in the event, in the event that plaintiff were unable to prove his contract under the first cause of action, then our alternative cause would be for him to recover the money under the oral agreement which he expended in actual work done on the premises in connection with the original agreement together with a reasonable sum, which I believe was set out in here, a hundred dollars a day for the time which the [7] plaintiff devoted to this.

The Court: How is that distinguished from the third cause?

Mr. McNealy: And in the third cause of action, your Honor, we have asked there as an alternative cause in the event of failure of the other two causes that as an alternative cause that the plaintiff recover on a narrowed basis which would be in effect leaving it to the jury to decide what the fair and

reasonable value of such services that the plaintiff had performed.

The Court: Counsel, don't the second and third cause, causes, aren't they the same?

Mr. McNealy: I believe, your Honor—(Interrupted)

The Court: You say we had so much expense and our services were worth so much money. If there is any difference in counsel's mind I want to know it for my own guidance. I can't see anything that distinguishes the two but possibly there is some.

Mr. McNealy: I question in my own mind whether it has a great deal of effect, your Honor, on the case. Strictly speaking, the only difference I have found there is that I know is there is the fact that the second cause of action, the plaintiff has asked for or stated one hundred dollars a day was a reasonable value for his services, whereas in the third cause of action it was left open as to what the value of his services was.

Mr. Hepp: May it please the Court, I think there is one other distinction there. The second cause of action would be, of course the Court's theories of the plaintiff that whether or not [8] services were of any value to the defendant. They were sound in contract. He had requested they be performed and they were so performed as alleged, at least as alleged here by the plaintiff in this cause which would give him a contractual right for recovery regardless of whether they were of any value at all to the defendant. In the third cause, it is narrowed. I think that there is a technical distinction. I did not draw

the pleadings in this cause, but I discern that as I studied those pleadings.

The Court: Mr. Hepp, if there should be a recovery on the first cause, wouldn't that preclude recovery on the second and third?

Mr. Hepp: These are alternative prayers.

The Court: Now, Mr. McNealy, one of the defenses raised is the statute of frauds. Do you have any authorities on that subject you might submit to the Court prior to the trial?

Mr. McNabb: I have them, not at the moment, your Honor, but I have them at the office that I can submit.

The Court: And, of course, that would also mean that the plaintiff may submit authorities on that point, as you may wish but I would like to have them. I have looked at the Territorial statute of frauds which is unlike any I have ever seen, but if you have any law on that subject, counsel, I would like to have it. The Court will adjourn. Let's see, Mr. Stevens, you have something? This case is continued until two o'clock.

(Thereupon, at 12:00 noon a recess was taken until 2:00 p.m.) [9]

Afternoon Session

(The trial of this cause was resumed at 2:00 p.m., pursuant to the noon recess.)

The Court: Parties wish to have the jury polled?

Mr. McNealy: We will stipulate they are all present, your Honor.

Mr. McNabb: Yes, your Honor.

The Court: Very well.

Mr. McNealy: We would like to make a brief opening statement, your Honor.

The Court: Very well.

(Thereupon, Mr. McNealy made an opening statement to the jury in behalf of the plaintiff.)

(Thereupon, Mr. McNabb made an opening statement to the jury in behalf of the defendant.)

A. E. WAXBERG

the plaintiff, appearing as a witness in his own behalf, was duly sworn and testified as follows:

Direct Examination

Q. (By Mr. Hepp): Would you state your name to the Court and jury, please.

A. A. E. Waxberg.

Q. Where do you live, Mr. Waxberg?

A. Fairbanks, Alaska.

Q. What is your occupation?

A. General contractor. [10]

Q. How long have you been engaged in the, in an occupation that is related to the building trades, general contracting as such?

A. About thirty years.

Q. And how much of that time has been spent, if any, in the Fairbanks area?

A. Eighteen years.

Q. Do you have a business here?

A. I do.

Q. Where is your business, sir?

A. Wendell and Lacey.

(Testimony of A. E. Waxberg.)

Q. You have been engaged in that business for eighteen years here?

A. Not in that particular business, no. Been working for other people, running work for other people.

Q. But it has always been in the building trades line, has it? A. That's right.

Q. What specific type of building trades are you best acquainted with, that is to say, carpentry, plumbing?

A. Carpentry, plumbing, electrical, general building.

Q. Have you since your inception of the business here that you built any buildings around the Fairbanks area? A. Several, yes.

Q. Would you name several of them?

A. Well, I was carpenter foreman on the News-Miner Building. [11]

Mr. McNabb: What was that now?

Mr. Waxberg: News-Miner Building, carpenter foreman.

Q. (By Mr. Hepp): What is that, the Lathrop Building? A. Lathrop Building, yes.

Q. I see.

A. Put up KFAR transmitter station, crash station out at Ladd Field, gas station number one, N. C. Garage. Of course, that is burned down now. Several other buildings around town here I have been foreman on and some of them I put up in my own business.

Q. I see. Are you presently in that business?

(Testimony of A. E. Waxberg.)

A. I am.

Q. Do you have any bids, work along that line this summer? A. Yes.

Q. What is your principal, if any, projects?

A. Well, I just got the Nenana School the other day.

Q. You are going to construct the Nenana School, are you? A. That's right.

Q. In terms of money what size, what size of building is that, how much money will that cost?

A. Three hundred thirty-five thousand was my bid.

Q. About a third of a million?

A. That's right.

Q. Do you know the defendant, Mr. Hill, Rudy Hill? A. I do.

Q. Do you know his wife, Mrs. Mary Hill?

A. Yes. [12]

Q. How long have you known them, or either of them? A. Since about 1949, I guess.

Q. Have you ever had any business dealings with Mr. Hill? A. Yes.

Q. When, when did you first discuss any business dealings with Mr. Hill, if you recall?

A. Well, as I recall it was in December of 1949 down at my office.

Q. That is down there on—(Interrupted)

A. Wendell and Lacey, yes.

Q. Wendell and Lacey? A. Yes.

Q. Are you acquainted with a building now known as the Polaris Building?

(Testimony of A. E. Waxberg.)

A. Well, I know where it is and I know the building, yes.

Q. What is the street address of that?

A. First and Lacey.

Q. Where is your business in relation to that?

A. Within a half a block.

Q. Half a block which way? A. Down.

Q. Down Lacey Street?

A. Right at the end of Lacey Street.

Q. You are down near the river?

A. Right next to the river, yeah. [13]

Q. You say that you discussed some business with Mr. Hill along in December of 1940, would you state the date again, please?

A. I believe it was in December, 1949.

Q. What was the subject matter of your discussion with Mr. Hill?

A. Well, it was about the possibilities of putting up a FHA building on his property.

Q. Which property was that?

A. Well, this was between First and Second and facing Lacey Street.

Q. Is that the site where the present Polaris Building is now situate?

A. Yes, part of it, yes.

Q. At that time, was there any building on that property?

A. There was some wanigans on there, I believe.

Q. Who was present if you recall in your office when you first discussed the subject matter of Mr. Hill building a building with you?

(Testimony of A. E. Waxberg.)

A. I believe William Berklid was there at the time. I don't know if he was in on the discussion but he knew that Mr. Hill was there.

Q. He was around?

A. Yes, he was around there.

Q. Would you state the substance of that conversation that you had with Mr. Hill that you recall?

A. Well, as I recall it was the possibilities of finding [14] out what a building, how a building should be constructed and what the approximate cost would be and so on and so forth.

Q. Was there any discussion about finances at that time?

A. Well, we would try to get an FHA mortgage or loan and he was to put up his property and all I was to have to do with was to promote or to help the engineering of the building and the, see that the specifications were right and so forth and then to construct the building. That was what we finally come to. That wasn't at that particular time.

Q. Did you have later discussions following this first one with Mr. Hill?

A. Yes, from time to time.

Q. What were the frequency of those discussions, I mean would they occur rarely or often?

A. No, they were quite frequent, oh, until, well, the last was almost continuous, I should say.

Q. I see, as a building contractor, Mr. Waxberg, in that field are building contractors interested in

(Testimony of A. E. Waxberg.)

the financing of buildings which they may be interested in building?

Mr. McNabb: I object to that as calling for a conclusion, no part of the issues in this case.

Mr. Hepp: I believe, your Honor—(Interrupted)

The Court: He may answer.

Mr. Waxberg: I believe so, yes. As far as I know they are. I have seen it happen several times.

Q. (By Mr. Hepp): As a result of these discussions you had with Mr. Hill [15] or that he had with *was*, was there any agreement formed between the two of you?

A. A verbal agreement, yes.

Q. When did that occur, sir?

A. Well, I would say that it more or less grewed as we progressed with the deal. I was led to believe that I was going to do the building of this. All we had was a mutual understanding and he kept calling me from time to time. He would be in Seattle, he would call me to do this and ask me to do that and I naturally thought that and he led me to believe that we were going to put the building up together.

Q. Now, Mr. Waxberg, you are familiar with the practice of people desiring to construct things to send out invitations to bid to supply cost figures and what you as a builder for instance would construct a building of given specifications?

A. Yes.

Q. Did that occur in this transaction with Mr. Hill?

A. No.

Q. Did he to your knowledge ever send out any

(Testimony of A. E. Waxberg.)

invitations to bid this in to different contractors?

A. No.

Q. What is this, in the nature of a negotiated price then as distinguished from a bid price, I don't quite understand?

A. Well, it is a, as a builder he came to me. He came to me as I am a builder and he didn't know how the building should [16] be constructed or what would be the best thing to do and so on and so forth, so he asked me to help him with the various things. They hired an architect in Seattle. This architect was not familiar with Fairbanks area at the time and Mr. Hill asked me to come down to Chiarelli and Kirk was the architects name and to discuss the matter with them. In the first place, we didn't know what the building would cost. We knew what the FHA would allow, which was, I believe, one million six hundred some odd thousand. I forget just what the figure was, but anyway, we had to design the building in such a manner that the price that we could build it for that price and that is the part that I had to see about, what the plumbing would cost and the structural steel and the cement and everything that went into the building, see whether it could be built for that amount of money.

Q. But following this understanding then with Mr. Hill, is it your testimony that you proceeded to supply information as requested to these Seattle architects in order that the building might be designed and costs for it accurately determined?

A. Yes.

(Testimony of A. E. Waxberg.)

Mr. McNabb: I am going to object to that question as leading and suggesting.

The Court: In some measure. It may stand.

Mr. Waxberg: I worked with the architect all the time. Mr. and Mrs. Hill were in the architects office discussing the building. [17]

Q. (By Mr. Hepp): In Seattle?

A. In Seattle.

Q. You were there also?

A. I was there, yes, sir.

Q. Up at this end, Mr. Waxberg, what did you do specifically among other things to compile the information that was necessary for this architect?

A. Well, about the first thing, Mr. Hill was in Seattle as I recall, he phoned me and wanted me to get a drill down on the ground as, to, for the foundation, what would be required for the foundation of the building.

Q. Is that what is commonly called a drill log?

A. Drill log, yes, sir.

Q. Would you explain to the jury what a drill log is?

A. A drill log is, they drill and test the ground and see if it is gravel in the sand or muck. What depth you have to go to get a footing for a building of that kind, which I hired Williams Equipment Company to do that.

Q. Who hired Williams Equipment Company?

A. I did.

Q. Do you know what the charges were for that service?

(Testimony of A. E. Waxberg.)

A. In going over, I couldn't—(Interrupted)

Mr. McNabb: Just a minute. I object, I object to what the charges were. [18]

The Court: He may answer if he knows.

Mr. Waxberg: I believe it is Four Hundred Seventy dollars. I have been going over the papers here recently. It would be impossible for me to remember these figures if I hadn't gone over the papers here recently as no one could.

Q. (By Mr. Hepp): Did you ever pay Mr. Williams for doing that work? A. I did.

Mr. McNabb: I object to that as not the best evidence. Move that the answer be stricken.

The Court: It may stand.

Q. (By Mr. Hepp): What other, if any, work did you do or have done in order to supply these architects with the needed information?

A. Well, under the similar circumstances I had Edgar Phileo make a, take a survey of the ground and adjacent buildings and make a plot plan which was agreed by Mr. Hill. He asked me to get this work done.

Q. Did you then hire Mr. Phileo to make these surveys?

A. Yes, through Mr. Hill. May I enlarge upon that?

Q. What were the names of the architects in Seattle that you spoke of?

A. Chiarelli and Kirk.

Q. A firm of architects that operate in Seattle?

(Testimony of A. E. Waxberg.)

A. That's right, which Mr. Hill contacted to begin with.

Q. Mr. Hill contacted?

A. I didn't contact them until Mr. Hill had discussed it with them several times. [19]

Q. You spoke of having gone to Seattle. Do you recall the number of trips, if there were more than one, that you made to Seattle in connection with this building project?

A. I made three or four trips.

Q. What was the principal purpose of your making these trips?

A. Mostly in discussing the construction of the building with Hill and the design of the building with the architects and also helping with getting an estimate up to present to the FHA.

Q. Was an estimate presented to the FHA?

A. It was, yes.

Q. Was a commitment issued?

A. There was.

Q. Who were the sponsors, if you know, of the FHA commitment that was first issued?

A. Mr. Hill and Mrs. Hill and myself.

Q. Would you state to the jury what a sponsor is?

A. Well, it is co-venturer, I would say, and that is about as close to it as I can come.

Q. Now, you have set forth in your complaint, Mr. Waxberg, that you paid one L. Orsini five hundred dollars. Who is Mr. Orsini?

(Testimony of A. E. Waxberg.)

A. Well, he is an accountant in Fairbanks at the time. I don't believe he is here now.

Q. Well, what was the nature of the services, if any, that he performed for you? [20]

A. Well, he was, he was preparing some financial statements for me as well as he did practically all the paper work in getting this FHA mortgage to the point that it got. If it hadn't been for his paper work why I don't know, I wouldn't have gotten very far at it either because I didn't know a thing about it. He helped to compile the figures.

Q. Did you ever pay Mr. Orsini any money for his services?

A. Well, yes.

Q. How much did you pay him?

A. I believe it was five hundred dollars.

Q. Concerning now the preliminary matters which would necessarily attend the start of a project like this and FHA commitment, was there anything necessary to do that you hadn't done in connection with this project of Mr. Hills?

A. No.

Q. The commitment was issued by the FHA then, I believe you testified and you done all the acts necessary in order to bring that about?

A. That's right.

Q. Did Mr. Hill know anything about building buildings when he first came to you?

A. I don't believe so.

Q. As gathered from your discussions?

A. I don't believe so.

(Testimony of A. E. Waxberg.)

Q. Did he ever make any statement to you that caused you to believe that he did know? [21]

A. Well, he knew what a good building was, naturally. He knows what a good building is. He has been around construction work. I don't know how much he has worked at it.

Q. Did you build this building for Mr. Hill?

A. No.

Q. Why not?

A. Well, to put it in plain words, I was kicked out.

Q. By whom?

A. I would say by Mr. Hill.

Q. When did this occur, sir?

A. Well, it was down at Seattle. He, he, oh, he, he kicked me out and I think Orsini had something to do with it, too. Orsini was kicked out, so was Chiarelli and Kirk, all of us at the same time.

Q. Was this after an FHA commitment had been had?

A. That's right.

Q. Did you ever learn the reason why Mr. Hill dismissed you?

A. No, I have never gotten the reason for it yet.

Q. Where were you at the time when your first information came concerning this dismissal?

A. In my office here in Fairbanks.

Q. Had you had any discussions in connection with the dismissal down in Seattle?

A. No, it was, I never did. Not at that time. That was the first I heard of it was in my office.

(Testimony of A. E. Waxberg.)

Q. Were there any other contractors that discussed this matter with you at that time? [22]

A. Well, yes, there was a Mr. Slater came from—(Interrupted)

Mr. McNabb: Just a minute; just a minute. I object to that as being not material to the issues in this case.

The Court: I don't believe the question is very certain. I am going to sustain the objection.

Mr. Hepp: I will withdraw the question.

Q. (By Mr. Hepp): Did you ever have a conversation with Mr. Hill wherein he elaborated on the original agreement between you in connection with the price of this building? A. Yes.

Q. Where was that discussion and when, please?

A. Well, that was in Seattle.

Q. Whereabouts in Seattle?

A. In the New Washington Hotel.

Q. Who was present at that time, sir, and what date, if you remember?

A. Oh, I don't know. It was the first part of May and Larry Orsini was in my room at the time.

Q. Was Mr. Hill there? A. Yes.

Q. You were there?

A. That's right. Mrs. Hill was there also.

Q. Mrs. Hill was there also?

A. That's right. [23]

Q. What was the general subject matter of that discussion?

A. Well, it was a matter of, as I say it or as I saw it why I was to leave money in the building.

(Testimony of A. E. Waxberg.)

In other words, what they call the kick-back, which goes into this deal between builder and owner and FHA deals. There is all kinds of that stuff going on as you people may be well aware of this.

Q. That's right, just address your statement.

A. And that was put to me and I didn't feel that I would have to do that.

Q. In substance, what was, did Mr. Hill make a proposal to you concerning some money to be returned?

A. Yes, it was fifty thousand dollars is what another contractor had offered Mr. Hill as a kick-back and that was put to me that I should do that or else the thing would be off.

Q. If I understand you right, in other words, of the FHA money that was coming on the job fifty thousand dollars that would go to you would be paid over instead to Mr. Hill?

A. That's right, paid over to Mr. Hill instead of me. You see the FHA allows a certain amount, certain interest rate for a contractor's fee and I didn't know at the time because the plans had never been completed. All we had was preliminary drawings. Just enough to get the FHA commitment is all we had, preliminary drawings. It would be impossible for me to know whether there is ten thousand, five thousand or a hundred thousand dollars profit. It is the idea of getting the building built. And I knew I was safe up to as far as within fifty thousand dollars at least. [24] Well, when the demand is made that I kick back fifty thousand dol-

(Testimony of A. E. Waxberg.)

lars, I couldn't see it. There is where—(Interrupted)

Q. You refused Mr. Hill's proposal of giving him fifty thousand dollars out of the money that FHA designates to you as a builder?

A. That's right.

Q. Is that when you were dismissed, Mr. Waxberg?

A. Yes, that is when Mr. and Mrs. Hill left my room and I never saw them after that for months. I tried to contact them but I couldn't get yes or no out of them.

Q. Have you, were you at that time and since ready, willing and able to perform your agreement with the Hills in constructing that building?

A. I was any time that the plans would have been completed so that I could give a definite figure, I was ready to go and able to go.

Q. Do you know whether a building was ever constructed on these premises? A. Yes.

Q. Do you know who constructed that building?

A. S. S. Mullen.

Q. Where is Mr. Mullen from?

A. Seattle, I believe.

Q. Mr. Waxberg, I notice that you mentioned the dates of around the first of the year, that is to say, December and January of 1950 and then May. Now, was that May of the same year, 1950?

A. Yes. [25]

Q. In the construction business, Mr. Waxberg, what usually occurs, what type of activity are con-

(Testimony of A. E. Waxberg.)

structors, contractors that is to say such as yourself, what type of activity if any during those months?

A. Well, that is generally the busiest time of the year.

Q. Why is that?

A. Well, mostly all of these government contracts are being let at that time.

Q. They are being let through those early spring months? A. That's right, yes.

Q. Did you have any opportunity while you were working on Mr. Hill's project to bid in or figure out and bid in other projects?

A. No, I didn't. I dropped everything for this because I figured this was a sure deal.

Q. This was a sure deal. Did you have a good year, 1950, sir?

Mr. McNabb: I am going to object to that as having no bearing on the issues.

The Court: Sustained.

Mr. Waxberg: Yes. May I get that clear, your Honor.

The Court: The answer will be stricken and counsel will proceed.

Mr. Waxberg: I didn't understand what you said.

Mr. Hepp: I don't think he understood. [26]

Q. (By Mr. Hepp): You didn't bid on any jobs?

Mr. McNabb: I object to that as having no bearing on the issues.

Mr. Hepp: Your Honor, I believe he has a right to show if he was damaged by not being able to

(Testimony of A. E. Waxberg.)

perform his contract or agreement with Mr. Hill.

The Court: I don't believe, counsel, that is a measure of damages. I will sustain the objection.

Q. (By Mr. Hepp): On your trips to Seattle, Mr. Waxberg, who paid for the Pan-American, or how did you travel?

A. I traveled by Pan-American.

Q. Who paid for those trips? A. I did.

Q. Have you ever been reimbursed for any of that money? A. No, I have not.

Q. Where did you stay when you were in Seattle on these different trips?

A. Oh, various places. I stayed in a—(Interrupted)

Q. Excuse me. Did you stay in hotels or did you stay in private homes?

A. Well, I stayed in hotels and auto courts. I stayed in the same auto court with Hills for two different times while I was down there.

Q. Did you eat out, that is eat in restaurants and cafes? [27] A. Yes.

Q. Mr. Waxberg, who paid for your meals and your hotel rooms? A. I did.

Q. Have you ever been reimbursed for any of that? A. No.

Q. Was it necessary to employ taxicabs and other forms of commercial transportation in and around the City of Seattle? A. Well, yes.

Q. Did you employ taxicabs and other forms of transportation? A. I did.

Q. Who paid for that employment?

(Testimony of A. E. Waxberg.)

A. I did.

Q. Have you ever been reimbursed for any of that? A. No, I haven't.

Q. Do you know how much the plane fare for each trip was to Seattle and back at the time that you went there on Mr. Hill's business?

A. Well, something over two hundred, two hundred fifteen, seventeen, something like that. I got the copy of the cancelled checks in my office. I could bring up here.

Q. It has been some years since you have filed this complaint, has it been, Mr. Waxberg?

A. How's that?

Q. It has been some years since this matter originally started? [28]

A. Oh, yes, I don't know, it has been two and a half, three years ago.

Q. Could it have been in the spring of 1950?

A. It might, could have been. I guess it was. I don't remember now.

Q. At the time when you, did you, did you sign a copy of the second amended complaint in this?

A. Yes.

Q. And certify it was true. At the time when that was prepared did you have the figures accurately in your mind and memory of your expenditures?

A. I believe so, substantially correct, yes.

Q. Would you care to review a copy of the, the court's complaint to refresh your memory since it has been some years?

(Testimony of A. E. Waxberg.)

A. It would be a help.

Mr. Hepp: Does the Court have its file here?

The Court: I have just sent the file out. Mrs. Wann can get it.

Q. (By Mr. Hepp): Would you open that file to a paper called the second amended complaint.

A. Well, I can set and look at this paper all day and I would never be able to remember all the figures anyway, if you are going to ask me what all the figures are.

Q. Mr. Waxberg, were they correct at the time they were put in there? [29]

A. I would say substantially, yes.

Q. It was fresh in your mind was it, at that time? A. Yes.

Q. How many days of your services did you spend in behalf of this project with Mr. Hill?

Mr. McNabb: I object to that on the grounds it is too vague and indefinite.

The Court: Ask him if he knows. Sustained.

Q. (By Mr. Hepp): Do you know how many days you spent?

A. Forty-three days. I just got through reading it.

Q. What is the reasonable value, Mr. Waxberg, of services of a man in your position?

Mr. McNabb: Object to that as not the best evidence.

The Court: He may answer.

Mr. Waxberg: I would say a hundred dollars a day.

(Testimony of A. E. Waxberg.)

Q. (By Mr. Hepp): If you know, is that the regular price that is charged in this area for services comparable?

A. Comparable to that, yes.

Q. And you state that you spent forty-three days all told? A. That's right.

Q. In the service of the defendants. Did you ever go any place other than Seattle in connection with this business of Mr. Hill's?

A. Went to Juneau one time. [30]

Q. I see, what is at Juneau in connection with this business? A. Juneau, Alaska?

Q. Yes.

A. FHA Headquarters for Alaska.

Q. Oh, I see. The FHA Headquarters for Alaska is in Juneau? A. Yes.

Q. Did you go there for the purpose of discussing any business for Mr. Hill?

A. I went with Mr. and Mrs. Hill and Chiarelli of Chiarelli and Kirk went, too.

Q. Whom did you see in, what office did you go to in Juneau?

A. Well, to tell you the truth I, I didn't go to any office. I went there, Mr. Hill and Mrs. Hill took care of all the business.

Q. What was the purpose of your accompanying them?

A. Well, in case some question should come up as I get it from Mr. Chiarelli. We were both asked to go along.

Q. You were asked to go along as consultant?

(Testimony of A. E. Waxberg.)

A. In case there would be any questions come up.

Q. I see. How long did you stay in Juneau?

A. I believe it was overnight.

Q. Mr. Waxberg, on page five of your amended complaint, which you filed in this cause you have alleged that you expended the sum of six hundred fifty-two dollars, five cents for airplane fare in connection with this work, is that figure correct, sir.

A. Well, that should be—(Interrupted) [31]

Mr. McNabb: I object to that as being not the best evidence. No proper foundation laid for it.

The Court: The witness has said he doesn't know that he has his records in the office. I sustain the objection. Mr. Hepp, this might be an appropriate time for a recess. Members of the jury, once again I admonish you not to converse with any person or among yourselves concerning the case at trial, and do not express any opinion until the case is finally submitted to you. We will take a ten minute recess.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon, at 3:05 p.m., the Court took a recess until 3:15 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Parties wish the jury polled or do you wish to stipulate they are all present?

Mr. Hepp: We will stipulate that they are all present.

Mr. McNabb: We will stipulate.

The Court: Very well. You may proceed.

A. E. WAXBERG

the witness on the stand at the time the recess was taken, resumed the stand for further direct examination.

Q. (By Mr. Hepp): Mr. Waxberg—(Interrupted)

Clerk of Court: Plaintiff's Identification No. 1, No. 2, No. 3, and No. 4 and No. 5. Plaintiff's Identification No. 6 and No. 7. [32]

(Statement dated February 1, 1950, was marked Plaintiff's Identification No. 1.)

(Statement from Dolman Hotel dated 1950 was marked Plaintiff's Identification No. 2.)

(Statement from Baranoff Hotel was marked Plaintiff's Identification No. 3.)

(Statement from New Washington Hotel, Seattle, was marked Plaintiff's Identification No. 4.)

(Statement from New Washington Hotel, Seattle, was marked Plaintiff's Identification No. 5.)

(Statement from Orsini & Associates was marked Plaintiff's Identification No. 6.)

(Statement from Williams Equipment was marked Plaintiff's Identification No. 7.)

Q. (By Mr. Hepp): Mr. Waxberg, I show you Plaintiff's Identification No. 1, ask you to examine it, see if you know what it is, please?

A. That is correct.

Q. What is it, sir?

A. Well, this is a bill that I paid at the trailer

(Testimony of A. E. Waxberg.)

court where I was staying when Mr. and Mrs. Hill were staying at the same place.

Q. What is the date on that, sir?

A. This is February 1. [33]

Q. Of what year? A. 1950.

Q. I show you Plaintiff's Identification No. 2, ask you to examine it, please.

A. This is a copy of a bill where I stayed at the Dolman Hotel in Seattle and it is dated 1950 in the amount of, oh, there is several.

Q. Is that bill marked paid?

A. This is marked paid, yes.

Q. Did you pay it? A. Yes.

Q. You say this is a copy?

A. This is just a copy of it.

Q. How does it come that there is a copy of this?

A. Well, I didn't keep a lot of those bills, I don't keep the hotel bills. I pay the bill and probably stick it in my shirt pocket and lost and for that reason I called in or wrote to them rather and asked for a copy of the time that I stayed in the hotel.

Q. I show you Plaintiff's Identification No. 3, examine it, please, and state if you know what it is.

A. This is a bill from the Baranoff Hotel marked February 4, 1950, in the amount of nine dollars. That was when I was in Juneau with Hills.

Q. Did you pay that bill, sir?

A. It is marked paid and this is, this is an original. [34]

(Testimony of A. E. Waxberg.)

Q. It is one that didn't get into your shirt pocket? A. That's right.

Q. I show you Plaintiff's Identification No. 4, ask you to examine it, please?

A. This is a bill from the New Washington Hotel. It dates from March 8th to and through March 15th in the amount of eighty-eight dollars, sixty-five cents.

Q. Is it marked paid?

A. Of which I paid, yes.

Q. I show you Plaintiff's Identification No. 5.

A. This is a bill from the New Washington Hotel again covering the dates from March, just March 1st and 2nd and on through the, in the amount of seventy-seven dollars, eighty-six cents of which I paid.

Q. Did you pay that?

A. Yes. However, this is a copy also. It was written, sent to me 3-12-51.

Q. I show you Plaintiff's Identification No. 6.

A. This is a bill from Orsini and Associates, Inc., dated April 10, 1950 in the amount of five hundred dollars which I paid and it is for professional services January 1 through March 31st, 1950, preparation of financial statement, cost estimate and related matters pertaining to your sponsorship of FHA commitment No. 130-42016.

Q. Plaintiff's Identification No. 7. [35]

A. This is a bill from Williams Equipment Company dated June 7, 1950. I don't know why the

(Testimony of A. E. Waxberg.)

delay but it is for drilling, thaw-testing and so forth for the drill log that we obtained.

Q. How much is that bill, sir?

A. It is four hundred seventy dollars.

Q. Did you pay that? A. I did.

Q. Have you ever been reimbursed any part of the moneys that you have expended?

A. No, I have not. Not a dime.

Q. Did you ever have any receipts for cabfares?

A. Well, yes.

Q. What kind of receipts do you get?

A. Oh, receipts. I thought you said need for.

Q. Receipts for cabfares? A. No, I never.

Q. How did you pay for your cabs?

A. Generally cash. I never got a, I never got a—(Interrupted)

Q. Did you get receipts for your meals, sir?

A. No.

Q. How did you pay for them if at all?

A. Cash.

Q. I would like to go into a little bit at this time, Mr. Waxberg, repetitiouswise, this agreement that you had, do you [36] recall the figure, the value of the building, that is the preliminary figures of the cost of this building prior to or at the time when the FHA was first approached for a commitment. What was the value of that building if you know, preliminarily?

Mr. McNabb: Object to that as being not the best evidence, calling for a conclusion.

The Court: The Court is going to sustain the

(Testimony of A. E. Waxberg.)

objection. You have asked about the value of the building. There has been no building in evidence.

Mr. Hepp: I will rephrase the question.

Q. (By Mr. Hepp): What was your calculations or yours and the architects calculations as to the cost to FHA or to Mr. Hill of the building that is proposed or is the subject matter of this agreement you have been testifying?

Mr. McNabb: I object to that as calling for a conclusion, no proper foundation laid for the testimony, not the best evidence.

The Court: He can state if he knows. You may proceed.

Mr. Waxberg: I am quite sure, I am sure it was one million six hundred ninety-four thousand three hundred seventy-four dollars. That was the FHA commitment within a dollar or two.

Q. (By Mr. Hepp): Now, figuring back from a cost of construction, what margin, what amount of money if you know would that give to the [37] contractor in accordance with your calculations submitted at that time?

A. Well, with what information—(Interrupted)

Mr. McNabb: Just a minute; just a minute. That question is not within the issues in this case. The answer to it is not within the issues. It has no bearing on this case whatever.

Mr. Hepp: Your Honor, I think it is a measure of damages.

The Court: I believe I know what counsel is trying to develop, but I feel that I must sustain the

(Testimony of A. E. Waxberg.)

objection at this time. There has been no proper foundation laid for the question.

Q. (By Mr. Hepp): Mr. Waxberg, did you calculate the cost of construction of this building which was submitted to the FHA at the figure of one million six hundred ninety-four thousand three hundred seventy-four dollars. Did you calculate the construction costs of that building?

A. I did as far as I could with the preliminary drawings we had at that time, yes.

Q. Now, subtracting those construction costs from the cost of the building, that is to say one million six hundred ninety-four thousand three hundred seventy-four dollars, what difference in terms of money would there be?

A. Well, at the stage that the drawings were completed at the time that we arrived at a figure, I had it figured at about [38] fifty thousand two hundred eighty dollars, or three hundred forty dollars, somewhere in there, would be contractor's fee at that time. However, the drawings were not completed so I could not come up for a completed building because I was kicked out of this deal before the drawings were completed. You must remember that.

Q. That is as near as you can calculate to the extent that Mr. Hill allowed you to go, would that figure be your losses as anticipated profits in building this building?

Mr. McNabb: I object to that, no proper foundation, no showing that he knows.

(Testimony of A. E. Waxberg.)

The Court: The Court is obliged to sustain the objection. I believe it is highly speculative in view of what the witness has already stated. The objection is sustained, Mr. Hepp.

Q. (By Mr. Hepp): Mr. Waxberg, do you know what the builder's profit would be on that building?

A. I believe, it was—(Interrupted)

Mr. McNabb: Just a minute, same objection, speculation.

Mr. Hepp: Your Honor, this man has testified that he calculated these costs and he knows these figures. I don't know who would be in a better position to know what anticipated profit would be made than a builder himself that figures the job.

The Court: Mr. Hepp, there is no doubt about the importance of this matter, but I don't believe that this witness is yet qualified to speculate or to testify as to the profit that might have been lost by him when he has not yet stated that [39] the plans were completed and the building was agreed upon, the type of construction. He says the plans were incomplete. Now, how can he testify as to the expected profit? I sustain the objection.

Q. (By Mr. Hepp): Mr. Waxberg, what does the FHA allow percentage-wise as a builder's profit?

Mr. Nabb: I object to that as having no, move that the answer be stricken on the grounds it has no bearing on the issues of this case because it is a, does not represent profit on a job as something allowable.

The Court: The Court is going to sustain the ob-

(Testimony of A. E. Waxberg.)

jection because the Court feels there would be no proper foundation laid for a contract as yet.

Q. (By Mr. Hepp): Going back, Mr. Waxberg, I believe you testified that you entered into an agreement with Mr. Hill? A. Yes.

Q. By agreement, what do you mean?

A. Well, it was a mutual agreement that I was to be the builder and he was to be the owner of the building and I was to get for my risk and my share of the profit would be what the FHA allows which is six per cent on the total amount of the commitment. See in other words, the builder's fee, which is standard all over the country, is six per cent of the commitment. [40]

Q. You mutually agreed with Mr. Hill, now there must have been more to it. What was all contained in that agreement, if anything more?

A. Well, that I was to help promote the building and help to get the plans completed and, which I did everything I could. We got the commitment.

Q. Was there any time set for the completion of this building?

A. As I recall it was about fourteen months that I agreed that I would put the building up in from the time of the commitment.

Q. Do I understand that any time within fourteen months or fourteen months?

A. Within the fourteen months.

Q. You could have put it up in eleven months, that was within the terms of your agreement?

A. That's right.

(Testimony of A. E. Waxberg.)

Q. Was there any other part of that agreement, were you going to invest any money into the building, Mr. Waxberg?

A. Well, yes, I was to leave, providing the money was made, to leave fifty thousand dollars for Mr. Hill's use and he could pay me back at any time that it was convenient. We hadn't made any agreement as to when the payments or how the payments were going to be made, but as I recall he wanted that money to put in a bar down in the basement of this deal and I agreed that I would leave fifty thousand providing there was that much and he could [41] pay me so much a month. We never come to any agreement as to how that was to be paid back. However, the rest of it I was to get cash.

Q. Do you know, Mr. Waxberg, what six per cent of one million six hundred ninety-four thousand three hundred seventy-four dollars is?

A. Well, it is roughly a little over a hundred thousand.

Q. Now, I believe you testified that there was some talk about a fifty thousand dollar kick-back offer made to you, has that got anything to do with this fifty thousand you are talking about now?

A. Now, that is an entirely different thing. That kick-back would mean that I would never get the fifty thousand. I would just naturally give it to him. That wasn't the agreement that I had. The agreement that I would leave fifty thousand.

Q. Well, can you state the date which you state

(Testimony of A. E. Waxberg.)

that this agreement was had? That is, these negotiations culminated in a meeting of the minds and a mutual, I think you said a mutual agreement, what date was that, Mr. Waxberg?

A. Well, about the, about the first time I went to Seattle. I believe it was in January, 15th or the 25th or somewhere in there.

Q. Was that the first trip to Seattle?

A. That first trip to Seattle I had the assurance that if the building was, if we could get the FHA commitment that I would be the builder of it. [42]

Q. You mean the agreement was conditioned upon that?

A. Well, yes, we hadn't even applied for the commitment at that time. We worked together from January 15th and on through and it was February or some time when we got the commitment. When we got the commitment I was all through. They didn't kick me out before that though.

Q. I understand that. I believe we have gone through that, Mr. Waxberg. When did you arrive at this figure of one million six hundred ninety-four thousand three hundred forty dollars that was arrived at with the FHA?

A. That was arrived at in the architects' office. We got that figure from plumbing companies, steel companies, various supply houses. Mr. Chiarelli helped compile those figures. We worked together on it. There was other fellows involved, too, like heating engineers and so on and so forth.

Q. Mr. Waxberg, in your experience as a build-

(Testimony of A. E. Waxberg.)

ing contractor, are drill logs and surveys necessary for architectural plans to be drawn on a building such as the one that Mr. Hill contemplated building at that time? A. Yes.

Mr. McNabb: I object to that as no proper foundation having been made, no showing that he knows, no showing the purpose for which they would be required.

The Court: I will permit the answer. I concede that the type of building, if any, is very indefinite. He may answer. [43]

Mr. Waxberg: Well, I have never heard of, I have been in the construction business for years and years and I never heard of a building being constructed without finding out what kind of soil or what kind of foundation. I have been, most every government agency has to have a plot plan indicating, even on a FHA home you have to show the surrounding area. That I know.

Mr. McNabb: I object to that answer, move that it be stricken on the grounds that it isn't responsive to the question. Not within the issues.

Mr. Waxberg: Then I misunderstood the question.

The Court: It is ordered stricken. Maybe we will have the question read or rephrased, just as you like.

Mr. Hepp: I will rephrase it.

Q. (By Mr. Hepp): What type of building, what was the subject matter of your agreement with Mr. Hill, what type of building?

(Testimony of A. E. Waxberg.)

A. Concrete.

Mr. McNabb: I object to that as having no bearing on the issues of this case. I think it is supposed to be preliminary to the question he asked previously. At this stage it is not relevant.

Mr. Hepp: Your Honor, I don't know how you would show what type of footings were necessary unless you show what type of building.

The Court: He may answer. [44]

Mr. Waxberg: It was an apartment building built out of concrete, a concrete apartment building.

Q. (By Mr. Hepp): Single or multiple story building?

A. Multiple story, seven story building I believe it was.

Q. Does the construction of such a building require a showing of what was under the ground for the purpose of determining the type and size of footings to support that?

A. It certainly does.

Mr. McNabb: Just a minute. I object to that and move that the answer be stricken on the grounds that at this stage of the proceedings we are not discussing the building as such and the answer to the question is not material, and I move that it be stricken.

The Court: It may stand.

Q. (By Mr. Hepp): I believe you testified that you hired some findings, some drill logs?

A. That's right.

(Testimony of A. E. Waxberg.)

Q. Were those findings of service, of value to Mr. Hill?

Mr. McNabb: I object to that as calling for a conclusion.

The Court: He may answer.

Mr. Waxberg: The findings were, yes, they were. The commitment was based on, that is part of what the commitment was [45] based on. It was approved by the FHA.

Q. (By Mr. Hepp): Can you state the reasonable value, Mr. Waxberg, of your services to Mr. Hill in connection with the preliminary surveys, all that work that you did which he profited by, if any, up to the point of FHA commitment?

Mr. McNabb: Object to that as being not the best evidence, calling for a conclusion.

The Court: He may answer.

Mr. Waxberg: Well, yes, I feel that I lost out in many ways by spending my time on this particular project.

Q. (By Mr. Hepp): We are now talking about the value of services to Mr. Hill as set forth in your third cause?

A. Well, it is certainly worth a hundred dollars a day for my time that I spent on it.

Q. How many days did you spend?

A. I believe it was forty-three days.

Mr. Hepp: You may question the witness.

Mr. McNabb: Are you reserving, Mr. Hepp, your offer of these identifications purposely? It is all right if you are.

(Testimony of A. E. Waxberg.)

Mr. Hepp: I believe we have until the close of the case. There may be more. We didn't want to take up the Court's time.

The Court: Very well, very well. [46]

Cross Examination

Q. (By Mr. McNabb): Now, Mr. Waxberg, when was the first time that you discussed a building with either Mr. or Mrs. Hill?

A. As I said before, it was some time in December of 1949.

Q. You don't recall? A. In my office.

Q. You don't recall the day?

A. No, I don't recall the day. It was in—(Interrupted)

Q. Do you know why they came, or who came to you? A. Mr. Hill.

Q. Mrs. Hill did not accompany him?

A. No.

Q. Was anyone else present at that meeting?

A. I believe Bill Berklid was.

Q. Was there anyone else present there?

A. I don't remember.

Q. Prior to the time that you had that meeting with Mr. Hill had you had a conversation with anyone at all concerning the possibility of Mr. Hill's building, or constructing or having constructed a building? A. No.

Q. At that time had you ever discussed the construction of a building for Mr. Hill with Mr. Orsini? A. No.

(Testimony of A. E. Waxberg.)

Q. What sort of a building or type of a building was discussed at that December meeting? [47]

A. This apartment building.

Q. Where was that to be located?

A. It was to be located facing Lacey between First and Second.

Q. How many streets was that building to face on? A. Three streets.

Q. How deep was it to be, east and west?

A. I don't remember the figures other than I know it is longer on the First Street side than on the Second Street side and it was to cover the full of Lacey.

Q. Now then, for the purpose of the record, was that building ever constructed? A. No.

Q. Was a building even similar to that one ever constructed? A. No.

Mr. Hepp: I object to that unless counsel defines what he means as similar.

The Court: The witness has answered.

Q. (By Mr. McNabb): How many stories was that building to be, Mr. Waxberg?

A. That was a seven story, I believe.

Q. Was it to have a basement? A. Yes.

Q. How much of a basement?

A. Well, it was over the full area. [48]

Q. What sort of a building was it to be, business, office, or what sort? A. Apartments.

Q. How many?

A. And business on the first floor.

Q. I beg your pardon, I'm sorry.

(Testimony of A. E. Waxberg.)

A. Business on the first floor and apartments on the upper floors.

Q. How many apartments were there to be in the building? A. I don't remember.

Q. Now, is that the only building that you ever discussed with Mr. Hill? A. Well, yes.

Q. You did not discuss with him the construction of any other type building?

A. Well, we discussed several types, I presume, when we first started out, but this was the conclusion of it.

Q. Now, I am talking to you about, at the first meeting. That is the only thing I am interested in right now?

A. No, I think there was a different building. I believe Mr. Hill had a preliminary sketch that, oh, let's see, that Alaska Architectural had made up for him.

Q. What sort of a building was that, sir?

A. As I recall, it was a concrete building.

Q. How large a building was it to be? [49]

A. I don't remember because we didn't go into it very far.

Q. So at the first meeting you did not in fact discuss the construction of an apartment building facing on First, Lacey and Second, but you discussed a building that the preliminary plans of which were drawn by Alaska Architectural Engineering Company?

A. That's right. I don't remember what that

(Testimony of A. E. Waxberg.)

drawing was because I believe I only saw it one time.

Q. Now, did you discuss the financing of that building?

A. Of the, it would be that Alaska Architectural brought?

Q. That's right.

A. I don't recall. I don't think so.

Q. What sort of a building was it, do you have any recollection at all?

A. I have no recollection because that was put aside practically right away because we, I don't remember it.

Q. Now then, did you discuss FHA financing at the time of the first meeting?

A. That I don't recall.

Q. Did you discuss money at all?

A. I don't even recall that.

Q. When did you get to the stage of the proceedings to commence discussing money?

A. Well, there was several meetings and I don't remember just when they, I think some time in January when Rudy, I had nothing to do with the financing in the first place. Rudy was [50] to look after that. That was his phase of it, that is what he was going to do and he wanted me to do the building. The financing I had nothing to do with.

Q. Do you now have any recollection of Rudy going to San Diego over the holidays in that very year to visit with his children and then coming back to Seattle?

(Testimony of A. E. Waxberg.)

A. I, yeah, I have a recollection of that, yes.

Q. Now, then, do you have any present recollection of your discussions prior to the time that Rudy went outside of building a business building with an RFC loan?

A. There may have been. There was quite a few, there was quite a few proposals as I recall. I don't remember. I don't remember those things.

Q. And in fact the plans that were prepared by Alaska Architectural and Engineering, that was in fact plans for a business building, was it not?

A. I don't remember.

Q. Could have been though?

A. It could have been, yes.

Q. Do you now recall that the plans or the drawing that was in fact prepared by Alaska Architectural Engineering was nothing at all like the building as it was figured to front on First, Second and Lacey?

A. That's right, as I remember it wasn't that kind of a building. [51]

Q. It was something entirely distinct, was it not? Now, you say at this time you do not now recall the number of units that were to be included in the big building? A. No, I don't remember.

Q. You do recall, Mr. Waxberg, that you testified under oath by stipulation between Mr. McNealy and me on the 8th day of May, 1952, at, from 2:15 p.m. on that afternoon, do you not?

Mr. Hepp: Just a minute. I object to any questions put concerning that matter. I don't think it

(Testimony of A. E. Waxberg.)

is relevant, pertinent. It is not before, in the issues here. That was not filed. As a matter of fact, the rules were breached when it was taken. We object to any reference being made to it at all.

The Court: The Court has been wondering about the interrogatories that might have been taken. I see no action taken on it.

Mr. McNabb: Oh, there is another matter of interrogatories which may be reflected by the file, your Honor, but I am talking about a stipulation in which Mr. Waxberg testified at a deposition.

The Court: May I see the stipulation you refer to.

Mr. McNabb: Well, it never was filed but that does not alter the fact that the testimony was taken and it was under oath in the presence of Mr. McNealy and myself.

The Court: What was the nature of the stipulation?

Mr. McNabb: That the deposition might be taken. [52]

The Court: Was the deposition taken for use in this case?

Mr. McNealy: If the Court please, I recall it has been a couple years or so ago. I don't remember that we had a signed, I don't believe that there was a signed stipulation. I think there was an agreement between Mr. McNabb and I that Mr. Waxberg's deposition could be taken and in fact was taken and I was present when it was taken in Mr. McNabb's office and I was present. However, since there were no preliminaries arranged as I re-

(Testimony of A. E. Waxberg.)

member in regard to objections or any formal parts made to the deposition I don't believe that it was ever signed by the defendant here, but it definitely was—(Interrupted)

The Court: Well, the Court will permit no reference to a purported deposition unless counsel lays the proper foundation by the filing of the proper papers, stipulations and so forth, so the Court will know whether or not it was properly taken on notice or on agreement. There is nothing in the original file unless counsel can point it out to me that clarifies the matter.

Mr. McNabb: For the purpose of the record, your Honor, I would, I don't know that it is particularly important at this time, but I would like to get it stated now once and for all that without a stipulation Mr. Waxberg would not have appeared at my office. Without a stipulation Mr. McNealy would not have appeared at my office. Without a stipulation Mr. Waxberg would not have answered the questions that were propounded to him nor would [53] a stenographer have been present who took the matter in shorthand, nor certainly would we have gone to the time and the trouble and the expense of typing the deposition which Mr. Waxberg did not refuse to sign, but which he just didn't sign and I have the certificate of the stenographer who took the deposition and I can certainly produce Mr. Parrish who swore the witness before any of his testimony was taken. I think it is all quite abundant from what occurred that the deposi-

(Testimony of A. E. Waxberg.)

tion was taken and without objection.

The Court: Well, it seems to the Court that if counsel during the trial is going to rely on a deposition that it should be made a part of the original Court file. I have gone through the file carefully and I found interrogatories to defendant and I found a motion that evidently has never been taken care of and I find no deposition in the file of this particular witness, the plaintiff. If counsel wishes to get the file in order the Court will permit it.

Q. (By Mr. McNabb): Mr. Waxberg, you did, when did you finally become aware of the number of apartments or the number of units to be placed in the building?

A. I believe upon the return of Mr., when Mr. and Mrs. Hill returned from San Diego or from south, they stayed at this auto court, they phoned me to come down to Seattle and they had then, or they then had a preliminary drawing of this apartment in [54] Chiarelli and Kirk's office as I recall it. That is the first time that I knew that Chiarelli and Kirk was in it, was making up the drawings. Now, I may be wrong for that, that is just about the way it was.

Q. You say then when you went out the preliminary plans were prepared?

A. They were, they had been prepared by Chiarelli and Kirk to a, well, just a rough, very rough preliminary plan and then later on as time when on why we got them to a point to where we could present them to the FHA for a commitment.

(Testimony of A. E. Waxberg.)

Q. And how many apartments were there to be in the building?

A. I don't remember. This was five years ago and I was kicked out of the deal and I have got other work to do than to remember that.

Q. Do you recall when you went out?

A. I believe it was the latter part of January, 1950, 29th or thereabouts.

Q. The 29th of— (Interrupted)

A. Thereabouts.

Q. Of January?

A. I think so. Maybe it was earlier than that. I don't remember. I was out there three or four times. My hotel bills indicate the date that I was out there.

Q. Well, how long, how many days did you go out before you reached an agreement to the construction of this building? [55]

A. I believe I was out there fourteen days one time.

Q. Was that the first time that you were out or the second time or do you have any present recollection?

A. I believe it was the second time.

Q. That you were out fourteen days?

A. I believe it was fourteen days I was out one time. Three or four days another.

Q. But the only way that we can establish then the first trip, the date of the first trip that you made out is by the hotel bill?

(Testimony of A. E. Waxberg.)

A. The date that I was down there. I would say it was.

Q. Well, do you recall where you stayed that first time?

A. I believe I stayed in this auto court the first time. I am not sure, or was that, no, I can't remember.

Q. Let me ask you this, Mr. Waxberg, are these receipts for all of the hotel bills that you had in connection with the trip?

A. I believe so. I might not have them all there but that is all that I found anyway, that I have any record of.

Q. Well, the first one that I can find here is the motor court, Munson's Motor Court and it is dated the 1st of February as rental from January 29 to February 1 inclusive. Do you believe that to be the first trip that you made out?

A. May I ask a question?

Q. Sure.

A. When is that one from the Baranoff Hotel in Juneau, when is that dated? [56]

Q. Oh, that is February the 4th.

A. In Juneau. Well, then, it must have been one previous to that then because I spent more time between the time that we went to Juneau than two days. That I know.

Q. Plaintiff's Identification No. 2 shows a date in May, hotel bill. Plaintiff's Identification 4 is a hotel bill showing a date as March the 1st. Plaintiff's Identification 5 is a hotel bill, March the 12th.

(Testimony of A. E. Waxberg.)

Identification 3 is Juneau, the Baranoff, February 4; and No. 1 is an auto court in Seattle, I take it. February 1st. Now, you have no earlier receipt, do you now, then believe that your January 29th trip was the first one? A. Must be.

Q. And at the time that you went out on the 29th of January that was the first time that you could have seen any plans or any specifications at all for the building?

The Court: I don't know that the witness understood that as a question. It was sort of a statement. Were you thinking?

Mr. Waxberg: I was thinking. I was trying to recollect on that deal. It just doesn't tie in. That is, because I spent a considerable time on those drawings before, before we went to Juneau and according to this Juneau bill why we were there February 4th and I don't believe that that commitment was issued and I am just wondering if that Juneau bill belongs to the deal at all. [57]

Q. (By Mr. McNabb): Fact of the matter is that it doesn't belong in it at all?

A. Well, I don't know.

Q. It was way late in February when the plans were taken to Juneau, wasn't it?

A. It seems to me that that's right.

Q. Because the 608 expired on the 28th day of February and you got there right at the deadline?

A. That's right.

Q. So that the 4th of February couldn't possibly be part of this deal, could it?

(Testimony of A. E. Waxberg.)

A. No, I don't think so. That is what I was thinking about because it doesn't, I don't know how that bill, I don't even recall being in Juneau on that date when it comes right down to it. That is why I couldn't answer your question because this doesn't make sense.

Q. Now, you know Al, it was late in February before you ever went to Juneau with the plans?

A. I know it. At least as I recall it was, yeah.

Q. I think by refreshing your memory we can tie this thing down very tight in that regard because you must have a recollection that the 608 expired late in February and you had to hurry like mad to get there?

A. I believe it was some time in March that we were in Juneau. [58]

Q. Now then, in that regard, having refreshed your memory to that extent, do you now believe that the 29th of January was your first night in Seattle?

A. I believe it was about the first time.

Mr. McNabb: May we then, your Honor, have a recess.

The Court: Yes, I ask that the jury heed the admonition previously given and we will take a ten minute recess.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon, at 3:55 p.m., the Court took a recess until 4:05 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: The parties have both stipulated as to the presence of all persons in the jury box.

A. E. WAXBERG

the witness on the stand at the time the recess was taken, resumed the stand for further cross examination.

Q. (By Mr. McNabb): Now, Mr. Waxberg, have you refreshed your memory as to a possible earlier trip than that indicated by the, or earliest receipt that we have?

A. Oh, I believe in January or the first of February was the first trip.

Q. And was that then, that is the 29th day of January if the receipt is correct, the first opportunity that you had had to talk to Mr. and Mrs. Hill? [59]

A. No, I don't think so. I think we were, we talked about this building quite some time before they left here.

Q. Well, I know, naturally. My question was not proper in that regard, but the first opportunity that you had had to see them since they went outside just shortly before Christmas?

A. I believe so.

Q. In other words, they did not return to Fairbanks, did they?

A. I don't believe they did.

Q. And you had not gone outside? A. No.

Q. Consequently it, just to be sure now, did you stay at any other place besides this one, I mean

(Testimony of A. E. Waxberg.)

on the first trip out, other than that motor court, Munson's Motor Court?

A. Gee, I don't remember.

Q. Then to the best of your recollection at this time the first time you saw Mr. and Mrs. Hill after they went outside was on the 29th day of January of 1950?

A. Probably the first time I saw them. However, I talked to them over the phone several times.

Q. And that was the first time that you had been able to see the preliminary drawings that had been prepared by Chiarelli and Kirk?

A. Well, they were by no means complete when I saw them.

Q. On the 29th they were not complete? [60]

A. On the 29th. They weren't even, not more than started. An outline of them is what it was as I recall it.

Q. Do you now know, Mr. Waxberg, the number of apartments, apartment units that were to be in the building?

A. No, I don't.

Q. Had any plans or drawings been forwarded to you as a result of the Hills presence in Seattle and your presence in Fairbanks?

A. I don't recall that there was.

Q. Your recollection at this time is then that the first time that you saw any sort of drawing in reference to an apartment building is on or about the 29th day of January?

A. As I recall it, yes, sir.

Q. Did you agree to construct an apartment

(Testimony of A. E. Waxberg.)

building without having seen even any preliminary plans for it?

A. I might as well, I might say yes because the whole essence of the whole deal was the FHA would allow so much money and it was a matter of getting a building constructed for that price. It had to be designed so that it could come under that amount of money and we worked quite some time before we got it to where it could be constructed for that amount of money and a profit made. I certainly wouldn't go down to Seattle without having some kind of an agreement or Rudy Hill would not come to my office and discuss this thing if he didn't have something, if he didn't have intent that we should work together on it. [61]

Q. Mr. Waxberg, do you know what the maximum amount that the FHA would allow per unit in a multiple story apartment building?

A. They have, it was three different prices. I know there was, or two different classified classifications of apartments and they had a different amount set up for each one, but I can't remember those figures. This is five years ago.

Q. Now, did they, do you know or did you then know? A. I did then know, yes.

Q. What the maximum amount was that they allowed, that the FHA allowed?

A. I did at that time, yes.

Q. Had you talked to the FHA people prior to the 29th of January?

A. That was, Mr. Hill had done that.

(Testimony of A. E. Waxberg.)

Q. He had done that?

A. He had done that.

Q. Do you know whether they had a minimum amount per unit that the FHA would grant?

A. Well, as I recall it they had a minimum square foot basis that you could work on.

Q. Per unit? A. Per unit, yes.

Q. But that, of course, has nothing to do with dollars per unit? [62]

A. Well, yes, it was based on dollars per unit as well. So many square feet for so many dollars is what they would allow.

Q. Yes, I know, but do you know whether they had such a thing as a minimum amount that they would grant?

A. No, I don't believe so.

Q. Was there any element of chance or element of risk in securing an FHA commitment to build a building or is it just a matter of putting in an application and you get the commitment?

A. No, you have to come up with a piece of property and a certain amount of money along with this commitment in order to get it.

Q. Let me ask you this, do you know whether, or did you at that time know whether or not the FHA might allow something less per unit than their maximum? A. That I don't know.

Q. For construction? A. I don't know.

Q. Did you know it at that time?

A. I think I knew all about it at that time, yes.

Q. Did you not know then that the, that, that

(Testimony of A. E. Waxberg.)

there was a great deal of difference between putting in an application for an FHA commitment to build a building for a particular price and the amount that the government or the FHA might back or guarantee for the construction of it?

A. Well, this figure of one million six hundred some odd [63] thousand dollars were for some apartments of different types and I know that the figure was agreed upon by the FHA, but I don't remember the number of apartments or the kind, maybe there was two hundred or ninety. I don't remember which.

Q. Now, you tell us that you had not seen Mr. Hill between the, some time in December prior to Christmas of 1949 and the 29th day of January, 1950?

A. Well, that is just an assumption. I couldn't swear to that because that is a long time ago. When you ask me a question like that I can't say yes or no on it.

Q. When you say that the FHA agreed to something, are you talking about the commitment that was actually issued? A. Well, yes.

Q. They did not agree, or the FHA people did not agree to anything prior to the time that the commitment was issued, did they? A. No.

Q. Fact of the matter is, they agreed with a great many reservations in their commitment dated the 24th day of February?

A. Well, all the figures were compiled then as to the various costs and it was approved by the

(Testimony of A. E. Waxberg.)

FHA and the FHA man, let's see, what is his name.

Q. Staple? A. Staples, that's right.

Q. And his office is where? [64]

A. His office was in Juneau and with the man at the head of it in Seattle had talked it over with Mr. Hill and Mr. Chiarelli that the, that the different costs as they were supposed to be set up on the form that they have was O.K. and for that reason we all went to Juneau.

Q. And you went to Juneau when?

A. That I don't remember. It must have been in March.

Q. In March?

A. It must have been, or right after. I think that that commitment was back dated if the truth was known on it. We couldn't get under the gun on it as I remember. I may be mistaken on that because we were working against time so close. I don't remember if it was the 24th or the 25th that the FHA was to cease to exist and we had to meet that and now I don't remember if it was back dated or what.

Q. You have no recollection now at all of when you went to Juneau?

A. I would have to check my airplane ticket or something.

Q. And how many trips did you make to Juneau? A. Just the one trip.

Q. Well, now, we have a receipt from the Baranoff dated the, the 4th, the 4th day of February, 1950; were you down there on other business?

(Testimony of A. E. Waxberg.)

A. If I did, I don't remember it. I was traveling around quite a little bit. I don't recall being in Juneau. [65]

Q. For what purpose did you go to Juneau?

A. Well, it was for this commitment.

Q. Did you take the application with you at that time? A. Mr. Hill had it.

Q. Mr. Hill made that trip, did he?

A. Yes, he did.

Q. Who else went along?

A. On, Mrs. Hill, myself, Chiarelli and I believe Mr. Sumter.

Q. What else did you take with you at that time? A. Who else?

Q. What else, an application?

A. An application and the drawings.

Q. An application for a loan from FHA, is that what it was?

A. Well, it was some drawings for their approval.

Q. Well, was there any other paper work involved in the thing besides just the drawings?

A. Well, the application and the breakdown on the cost of the job and so forth.

Q. Those were taken up on that trip on the 4th then?

A. If it was the 4th, yeah.

Q. Fourth of February?

A. If it was the 4th. I don't know whether it was the 4th or not. It is the only trip that I recall Hill and myself and Mr. Sumter and Mr. Chiarelli

(Testimony of A. E. Waxberg.)

went. Now, what day that was, I don't know. [66]

Q. Well, we have the receipt and you made only one trip?

A. Well, I only made one trip with them, yes, and for this application. I might have made another trip. This particular deal that you are asking me about is, I don't know the date. What I am trying to imply is that I know that I went with Hills and Mr. Sumter and Mr. Chiarelli for the sole reason to obtain an FHA mortgage for this building, but what date I don't know.

Q. Do you think that this, that the trip that is represented by the receipt from the Baranoff Hotel dated the 4th of February is not the trip that you went with those named persons?

A. I tell you I don't know. Could be. It couldn't be.

Q. Let us assume at the moment that it was not that trip. Do you have any recollection of what plans and specifications for the building were submitted with the original application?

A. Well, it was the plans that were put out by Chiarelli and Kirk and the preliminary specifications. That I know.

Q. Do you have any recollection of the number of pages of drawings? A. No.

Q. Would you recognize the drawings if you saw them?

A. Yeah, I imagine I would unless they worked on them after I last saw them.

Clerk of Court: Defendant's Identification A.

(Testimony of A. E. Waxberg.)

(Drawings were marked Defendant's Identification A.) [67]

Q. (By Mr. McNabb): Now, I believe you testified on direct examination that not only you but Chiarelli and Kirk and Orsini were all fired?

A. That's right.

Q. As quickly as the commitment was issued?

A. That's right.

Q. So it was— (Interrupted)

A. I was told by Chiarelli. That is how I found out, really. I came down to Chiarelli's office to discuss it, to discuss the building and he had told Mr. Chiarelli not to discuss the building with me any further.

Q. At any rate that is what Mr. Chiarelli told you? A. That's right.

Q. Mr. Hill didn't tell you that, Mr. Chiarelli told you that?

A. Well, I couldn't get ahold of Hill.

Q. I say though, Mr. Hill didn't tell you that, Chiarella told you that?

A. I couldn't get Hill to tell me that.

Q. So it therefore follows that Mr. Hill didn't tell you? A. Well, yes, he did.

Q. What did he tell you?

A. When he walked out of the room in the New Washington Hotel he slammed the door and that was it. We are through.

Q. Now, I will hand you Defendant's Identification A, ask [68] you if you know what that is?

A. Well, this is not the drawing that, this is,

(Testimony of A. E. Waxberg.)

oh, yes, I guess it is at that. These are the drawings, yeah.

Q. Do you believe those to be the drawings that were submitted to the FHA with the application or a copy of them?

A. I would say so. As I recall it now, yes, sir.

Q. Now, that then is a copy of the original specifications that were submitted at the time of the application?

A. The drawings. The specifications, no.

Q. These are not the specifications?

A. No. The specifications had stated what the different kind of materials to be used, plumbing.

Q. Did you notice how many pages there are there?

A. No, I didn't count them.

Q. Just for the purposes of the record, will you state how many pages there are?

A. This is seven. Sheet No. 7.

Q. These are what you commonly refer to as preliminary plans?

A. That is what I would call preliminary plans, yes.

Q. And apparently if these plans were submitted to the FHA on the 4th day of February as we must, I believe, assume, you had had only about five days to examine and work on those preliminary plans?

A. Oh, I wouldn't say the 2nd or the 4th day of February. It couldn't be because the commitment as I recall ended February 24th and we were work-

(Testimony of A. E. Waxberg.)

ing against a deadline and I am [69] quite sure that we were, it couldn't have been February 2nd because we were working on a definite deadline on it. I remember that.

Q. Well, what do you believe the facts to be?

A. I believe the facts to be that we rushed up there with as little as we possibly could get by to get this commitment made under, before the FHA ceased to function. Now, if we had to have those drawings or even less drawings to get this commitment through why the FHA building would never have been sanctioned. This building or that building or any other building if we hadn't got under the gun.

Q. Well, when do you believe the plans were delivered, with the application or not?

A. The plans were delivered with the applications, yes.

Q. And you say that you went with them to Juneau? A. That's right.

Q. At the time that the application was submitted?

A. Yes, I did but I took no part in that.

Q. Well, I know, but the evidence is that the only time that you were in Juneau was the 4th of February?

A. Well, I, in other words you are trying to say that I wasn't never in Juneau or on the 4th.

Q. I am not trying to say anything. I just want to get the facts straight. What are they?

(Testimony of A. E. Waxberg.)

A. Well, if it was the 4th the commitment was issued, it was the 4th that I was there. [70]

Q. You were there in Juneau on the date that the commitment was issued?

A. Well, at the time that Mr. Sumter, maybe, I don't know when it was. I know it was in February some time or maybe it could have been even possibly the first of March.

Q. Well, how much time expired between the date of the application and the date of the issuance of the commitment?

A. That I don't know.

Q. Well, it wasn't just a matter of a few days, was it? A. That I don't know.

Q. You have no recollection at all? .

A. I know, I wasn't following through on that. In fact, when I came into Juneau that time I didn't go back to Seattle. Mrs. Hill went back to Seattle and Mr. Sumter and I come back up here to Fairbanks and that is the last that I knew of until I knew I was kicked out. I went back figuring everything was O.K. and some time, quite some time later why I found out that I was kicked out of the deal and then I made another trip to Seattle but that date I don't recall. I can produce it if it is necessary.

Q. Well, Mr. Waxberg, I don't like to belabor the point but I am trying to establish if we can whether or not you were present in Juneau with Mr. and Mrs. Hill on the date that the application was submitted to the FHA? A. I was.

(Testimony of A. E. Waxberg.)

Q. You were there?

A. I was there with Mr. Chiarelli as well. [71]

Q. How many trips did you make to Juneau?

A. One trip is all I can recall.

Q. We have established that date by the Baranoff receipt.

Mr. Hepp: Now, I object to that, the inferences under that. This witness hasn't stated he identified that money having been paid to the Baranoff. He has stated he is not certain that is the trip. I think counsel has gone past that point.

The Court: You may proceed with the cross examination but I think the jury understands that the witness was first definite as to the receipt and now he is indefinite but you may proceed.

Q. (By Mr. McNabb): But you only made one trip to Juneau anyway?

A. As I recall. I may have made two but I don't remember.

Q. Well, now, Mr. Waxberg, will you testify that the first trip that you made to Seattle was on the 29th of January?

A. Well, that I don't know. I was working on this thing from start to finish but, or start to where I dropped off.

Q. Will you testify that you made a trip to Seattle prior to the 29th of January.

A. No, I don't know for sure.

Q. Did you ever see a copy of the application for the loan?

(Testimony of A. E. Waxberg.)

A. I saw a copy of what I understood was the application for a loan, yes. [72]

Q. Do you know who prepared it?

A. No, I don't.

Q. You do recall who went to Juneau on that trip?

A. Mr. Sumter did.

Q. Well, Mr. Chiarelli had nothing to do with applications for loans, did he? He was the architect?

A. Yes, he was the architect. He was the architect. He made it possible that the application could be filled out and submitted, as well as I am part of that, too.

Q. Do you believe Mr. Chiarelli made out the formal application for a loan?

A. No, I don't.

Q. Do you have a present opinion as to who did make the application, make out the formal form?

A. No, I don't.

Q. You don't have any opinion at all in that regard?

A. Know who made the application out?

Q. Yeah.

A. Well—(Interrupted)

Mr. Hepp: Just a moment, I am going to object to that as argumentative. This witness said he didn't know who made the application out. I think that answers the question. Counsel is trying to get an answer here that he is trying to make something out of.

(Testimony of A. E. Waxberg.)

The Court: Did Mr. Hepp make an accurate statement? [73]

Mr. Waxberg: I believe so.

Q. (By Mr. McNabb): Do you know why Mr. Sumter went along on that trip?

A. Well, he was working with Mr. Hill all the time and he works, operates the Washington Mortgage Company and I don't know what connection there was there.

Q. Did you ever know?

A. Well, I probably did at that time. I know Mr. Sumter runs a bonding firm and he was, took an active part in all the FHA projects going at that time. That I know.

Q. He was working with Mr. Hill?

A. Yes, I was in Mr. Sumter's office several times.

Q. Why were you in Sumter's office?

A. Well, pertaining to this FHA deal.

Q. What part did Mr. Sumter play; what did you; did he ask you questions? Let's start here. Why did you go to Sumter's office?

A. I don't know. I don't remember now. I was in there in Sumter's office with Mr. Hill as I recall a time or two. Now, I don't remember exactly what we were in there for.

Q. A time or two?

A. I believe it was a couple of times.

Q. That is all that you ever called on Mr. Sumter?

A. There might have been more. I can't remem-

(Testimony of A. E. Waxberg.)

ber. That is four years ago, five, whatever it is.

Q. Now, you were in, right in the middle of this thing all the way from the first preliminary discussions in your place in December clear up until the commitment was issued?

A. More or less. I wasn't taking care of, I was spending most of my time with Mr. Chiarelli and various material outfits and so forth.

Q. Do you know how many applications were made for a loan prior to the time that the commitment was issued? A. No, I don't.

Q. Do you know whether there was more than one application made or not?

A. No, I know there was, one application made with my name on it and that was the first one.

Q. When was that made?

A. Well, that I don't recall.

Q. Do you know whether there was any applications made that did not have your name on them? A. That I wouldn't know.

Q. Do you know whether the commitment when it was issued had your name on it?

A. That I wouldn't know.

Q. Do you know whether a commitment was ever issued?

A. Well, yes, a commitment was issued.

Q. How do you know that?

A. Well, I found that out through various sources. [75]

Q. Did you ever see it or a copy of it?

A. I haven't seen the commitment, no.

(Testimony of A. E. Waxberg.)

Q. Well, you alleged in your complaint that your name was on the commitment, that you and Mr. Hill were partners or joint-venturers or something?

A. We were and we were supposed to.

Q. But you don't know now whether or not your name was even on the commitment, is that true?

A. I don't know what you are trying to prove. I would be frank with you if I knew what you were trying to prove.

Q. Well, I just want to know whether to your knowledge your name was on the commitment when it was issued?

Mr. Hepp: I am going to object to that unless he says as a sponsor or as a recipient or what? I don't think counsel's question is clear, name on a commitment.

The Court: I think he can answer whether or not he knows.

Mr. Waxberg: My name was on the commitment as a sponsor. R. P. Hill and Waxberg. The first commitment ever issued on that building.

Q. (By Mr. McNabb): Do you know the date it was issued? A. No, I don't.

Q. And you do not know how many applications were made but you do know that the one that you saw had your name on it?

A. The first application that was made my name was supposed [76] to be on it and was on it.

Q. You saw a copy of it? A. Yes.

Clerk of Court: Defendant's Identification B.

(Testimony of A. E. Waxberg.)

(Application for Mortgage Insurance was marked Defendant's Identification B.)

Mr. Hepp: May it please the Court, we would like to look at that Identification before any questions are put on it.

The Court: Very well.

Q. (By Mr. McNabb): Mr. Waxberg, I will show you Defendant's Identification B, ask you if you know what that is?

A. It is an application for mortgage insurance.

Q. Is that a copy of the one that you saw or the one that you saw? A. Very likely is.

Q. What is the date on that application, Mr. Waxberg?

A. This is January 31st, it looks like this.

Q. That appears to be the application, does it?

A. Yes.

Q. That date corresponds rather closely to your arrival in Seattle and subsequent trip to Juneau?

A. It appears to but I, I wouldn't be too sure about this deal. No, I don't think so. I don't think this is the one that went to Juneau. It is nothing that has been signed by Juneau. [77] No, I don't think so. I don't think that is the paper.

Q. You don't think that is what paper, Mr. Waxberg?

A. I don't know. I don't remember but I don't believe that, I can't believe that that is the paper that was dated January 31st, 1950, that that is the one that went to Juneau.

Q. Let me ask you this if Mr. Sumter and Mr.

(Testimony of A. E. Waxberg.)

Hill and Mrs. Hill will testify that that is the one and the only one, will you say it isn't?

Mr. Hepp: Now, I object to that, your Honor.

The Court: Sustained.

Mr. Hepp: Highly speculative. Don't answer it.

Mr. McNabb: Nothing speculative about that. It is quite simple.

Mr. Waxberg: That is the application all right. I don't think that is the date. We had all kinds of forms like that that we are filling out. I remember one time we went into the National Bank of Commerce. We had a big discussion there. We had a paper like that.

Q. (By Mr. McNabb): Who was with you that trip?

A. Mr. Hill, Mr. Orsini, I believe, and I am not so sure but what O. V. Selid, Selid Construction, or he was in Seattle at that time anyway. The reason I mention him is because he was giving, he was giving a check of five thousand dollars in some financing on the deal, and I think we had papers like that that [78] we discussed then.

Q. Then just before we recess for the day, will you testify that that is not a copy of the application for an FHA loan that was taken to Juneau?

A. I would not testify that isn't a copy of it. I would testify that I don't believe it is the date that this paper was taken to Juneau, January 30th. I don't believe that that was the day that paper was taken to Juneau.

Q. Well, now, that doesn't necessarily follow

(Testimony of A. E. Waxberg.)

that the date is the same. It wasn't made out in Juneau, was it?

A. No, it wasn't made out in Juneau.

Q. It had to be made out some place before it was taken to Juneau. Now, Mr. Waxberg, did, if your first trip to Seattle was on the 29th or 28th day of January of 1950 you could not possibly have agreed to construct a building for Mr. and Mrs. Hill prior to that time, could you, for a specified amount of money? A. No.

Q. It isn't conceivable and on the 29th day of January or in the event that it is determined that the preliminary drawings were taken to Juneau at the time the application you as a reasonable contractor would never have agreed to build a building for any amount of money on the basis of such plans, would you?

A. Well, I must have the dates mixed up. I must have gone to Seattle prior to the 29th of January regarding this work because I certainly worked on this job all the way through right [79] up to the time of the commitment and this January 30th don't ring in my mind at all, because I was there in March. I was there in February and I didn't find out that I didn't have anything to do with it until in May.

Q. I know, but now I ask you, you wouldn't have agreed to construct a building on plans like these preliminaries, would you, for any price?

A. It was a matter of estimating whether, we

(Testimony of A. E. Waxberg.)

have spare foot basis, we know how much it costs to run a floor.

Q. Would you have agreed to construct a building, application being made for a million and seven hundred thousand on seven pages of specifications?

A. Where is the specifications that were submitted to Juneau along with this? That is not all of it. You couldn't submit, I hope that the government would not accept a loan on a, a, an application for a mortgage that would be more absurd than me for the government to accept that for to loan one million six hundred thousand dollars.

Q. Seven hundred according to the application?

A. Well, whatever it is, yes. So that definitely can't be all of it. We had the specifications, everything that was to go into the building roughly for them to decide on and we had to have that in order to submit the application, so that is not all of it.

Q. Now then, what you mean is you would certainly have not [80] agreed to construct a building for a specific price on no more plans than those?

A. No.

Q. You wouldn't ever have done that, would you?

A. No, you have to have specifications. That is just some drawings. They are nothing on it outside of an outline of it.

Q. No contractor in the world would have agreed to such a thing, would he?

A. No, and we submitted more. FHA wouldn't even consider an application. Mr. Sumter, I believe,

(Testimony of A. E. Waxberg.)

wouldn't waste his time if that is all we had was that drawing. Would he waste his time to go to Juneau? No. Nor would I waste my time going to Juneau, but that is what you are trying to say, or want me to say, that is all that we had and that I would bid on that.

Q. No, that is not what I wanted you to say, I just wanted you to answer my question. Would you bid on a million seven hundred thousand dollar job on the basis of those plans? A. No.

Q. No other contractor in the world would, would he? A. No.

Mr. McNabb: May we recess, your Honor.

The Court: Members of the jury, once more I admonish you it is your duty not to converse with anyone or among yourselves concerning the subject of this trial, and do not express any opinion thereon until the case is finally submitted to you. [81] This case then will be continued until ten o'clock tomorrow and the Court will recess until nine.

(Thereupon, at 5:00 p.m., the trial of this cause was adjourned until 10:00 a.m., August 2, 1955.)

Be It Remembered, that the trial of this cause was resumed at 10:00 a.m., August 2, 1955, plaintiff and defendant both represented by counsel, the Honorable Vernon D. Forbes, District Judge, presiding:

The Court: Will the Clerk, please, call the roll of the jury.

(Thereupon, the Clerk of Court proceeded to call the roll of the jury.)

Clerk of Court: They are all present, your Honor.

The Court: Very well. I believe Mr. Waxberg was on the stand.

A. E. WAXBERG

the witness on the stand at the time the adjournment was taken, resumed the stand for further cross examination.

Q. (By Mr. McNabb): Mr. Waxberg, over the evening did you reflect, were you able to refresh your memory concerning earlier trips to Seattle than the one which we mentioned that occurred on the 28th or the 29th of January?

A. I don't recall any, no. [82]

Q. You weren't able to find any check or anything of that kind? A. No.

Q. Were you able to recall the nature of the building, the original drawings for which were prepared by the Alaska Architectural and Engineering Company?

A. No, I never even thought of it because it was one of the—(Interrupted)

Q. Do you now have any recollection at all concerning the possibility of constructing a building with the use of RFC funds?

A. I don't recall it, no.

Q. You have no present recollection of that?

A. No.

Q. Do you have any recollection of any transac-

(Testimony of A. E. Waxberg.)

tions with Mr. Orsini concerning the opening or the establishment in Fairbanks of a bank?

A. Yes, I do.

Q. I believe that you and Mr. Hill and Mr. Orsini all worked on that project to some extent, did you not?

Mr. Hepp: Now, I object to that, your Honor. It is certainly beyond the scope of direct examination. I don't know how a bank gets into this picture. There may have been numerous conversations but it is certainly not related to the issues here and exceeds the scope of direct examination and for that reason I object to it being brought in as a confusing sideline in this case. [83]

The Court: Perhaps it is true, Mr. Hepp, but it may be preliminary.

Mr. Hepp: I am perfectly willing to listen to counsel's offer to the bench to show its relationship to the issues of this trial.

The Court: The objection is overruled at this time. You may proceed.

Q. (By Mr. McNabb): You do recall that there was such a discussion? A. Well, yes.

Q. And you mentioned yesterday that on one occasion that Mr. Selid was in, was present with you at one of the banks in Seattle?

A. Well, that was, I am not sure about that. I know Mr. Selid put in some money in regard to this bank deal. I don't think it will hurt, I don't think it will do any harm to tell the whole deal about that. Dawson Cooper and Ovie Selid and

(Testimony of A. E. Waxberg.)

myself and I can't think of the fellow's name, he is a flyer here anyway.

Q. Jim Dodson?

A. Jim Dodson, that's right. Well, anyway, we went together and paid toward the building, there was to be a bank on the corner and we paid advanced rent on that and that was to be, the building was to be designed so there could be a bank in the corner.

Q. What corner is that?

A. That is on Second and Lacey. [84]

Q. And do you not now recall that the bank building was to be constructed under an RFC loan. It was a substantially smaller building and wasn't the big apartment building?

A. Oh, no, this was in the apartment building because it was pertaining to this FHA deal and there is where Ovie Selid comes in down at the National Bank of Commerce or whichever bank it was. He issued a check so that Mr. Hill could pay the FHA or the architect for, I forget now which one it was but he used that check that Ovie Selid issued on that and it was pertaining to the FHA mortgage on this particular building.

Q. And Mr. Orsini was in on that transaction, too, was he not; by that I mean he played some part in seeking to establish a bank?

A. Orsini played a big part in promoting the paper work for all on this building.

Q. For the bank I am talking about now?

A. Not necessarily too much, no.

(Testimony of A. E. Waxberg.)

Q. Now, the, do you now recall the number of units that were to be in, the number of apartment units that were to be in this building?

A. No, I don't remember.

Q. Do you recall now where you went after your trip to Juneau that is evidenced by the receipt of February the 4th?

A. I don't know if it was February the 4th or not, but when I left Juneau I came to Fairbanks.

Q. You came to Fairbanks, and when did you return to Seattle?

A. I believe that was some time in May.

Q. You didn't return to Seattle after that?

A. Well, I don't think that, that I am sure that I wasn't in Juneau on February 1. I think that is an error in the bill. I think you will find that that is a duplicate of the bill and it is a clerical error there because I am quite sure that I was in Juneau in March. I am sure of that and there must be a clerical error there.

Q. But you made only the one trip to Juneau?

A. As I recall, yes. I am quite sure.

Q. And the time that you did go there was when the application was made?

A. Not when the application was made. It was when the commitment was issued. There is where I got all confused yesterday. I confused this application with the commitment.

Q. Mr. Waxberg, what would have been the necessity for you to go to Juneau or how even would

(Testimony of A. E. Waxberg.)

you have known when to go to Juneau for the commitment?

A. Well, the FHA man and, in Seattle and also Mr. Sumter went along and Chiarelli and Kirk, and it was all for getting the commitment. We had the figures all compiled at that time so we knew approximately and what the building would cost and if you will note that the application is not the same figure that the commitment was issued on. [86]

Q. Well, it doesn't necessarily follow that it will be, does it?

A. No, not necessarily.

Q. You can put in an application for six million dollars and have a commitment issued for one million, couldn't you?

A. That's right. That is where I got confused yesterday thinking it was a commitment. I was confused on the time that I was in Juneau on account of this.

Q. Let me ask you this, sir, why did you and Mr. Chiarelli, if he went along, and Mr. Sumter, if he went along, why did you go, why did you accompany Mr. Hill to Seattle or to, excuse me, to Juneau?

A. Well, I was on the, I was one of the sponsors of it and my name was on the application and I certainly figured that as well as it might be something come up I thought it was necessary that I be there.

Q. Why did you think, why did Mr. Chiarelli go, if he went?

(Testimony of A. E. Waxberg.)

A. Might something come up in regards to some change or something that Mr. Staples would require to get the commitment.

Q. Why did Mr. Sumter go?

A. That I don't know. He was connected with the, with Mr. Hill some way or other. Now, I don't know. I wasn't paying too much attention to that. I was trying to get the building, the plans and the specifications for it completed and I let Mr. Hill do the other part. [87]

Q. But you believe now that you went to Juneau not at the time that the application was submitted, is that right?

A. That is correct.

Q. But at the time that the commitment was in fact issued?

A. That's right.

Q. Well, let me ask you this, how did you know when the commitment was going to be issued?

A. Well, that I don't recall but certainly we all didn't go up there just on the assumption that it would be, that the commitment would be made. I don't remember just what brought it on but we certainly all didn't go up there just for the trip.

Q. Well, that is reasonable.

A. And I don't remember.

Q. Is it not reasonable, however, thinking back over this situation to assume that the, that the preliminary plans were submitted along with the application, along with the specifications so to speak in accordance with the preliminary plans, that you went there at that time so that if the FHA people in Juneau requested additional information or

(Testimony of A. E. Waxberg.)

needed any changes that then was the time to talk about it, not when the commitment was issued?

A. No, no, that is wrong. Wrong. We didn't do too much talking about this. The FHA had an office in Seattle and most of this stuff was handled through the FHA office in Seattle as far as the preliminary work was concerned.

Q. But the commitment was issued where?

A. In Juneau. [88]

Q. Do you know then who received word that that the commitment was about to be issued?

A. That I don't know. It might have been through Mr. Sumter because he was helping on the promoting of this deal, I'm sure, but I wasn't following that phase of it. I had plenty to do with what I was doing without trying to cover all of it and after all, Mr. Hill was the head sponsor and all I was doing was supporting him in order to get the building going and I was to have no part in the building anyway. I was just the builder so I didn't follow a lot of that.

Q. So it is now your opinion that you didn't go to Juneau at the time the application was made?

A. I don't believe so. I can't recall it if I did. I certainly didn't go to Juneau, no, I didn't, not at that time the application was made.

Q. So then this Baranoff receipt is not accurate, or is it?

A. I don't believe so because I just couldn't have been there at that time.

Q. Well, Mr. Waxberg, look at this receipt now.

(Testimony of A. E. Waxberg.)

It has February the 4th at the top, it has from 2-2 to 2-4 another place and it is stamped paid February the 4th, 1950?

A. I still believe that this is a, well, I don't know. I can't tell you but I feel sure that it wasn't February the 4th I was there. However, that is four or five years ago. It is pretty hard to remember. [89]

Q. Of course, you do know that the commitment was not issued until some time after this, don't you?

A. That I know, yes.

Q. Do you know when the commitment was issued?

A. Somewhere around the 24th or the 25th of February as I recall. The first of March it might have been even in the first days of March. Now, I don't remember.

Q. Did you see a copy of the commitment?

A. I did not, no.

Q. When did you become aware that it had been issued in fact?

A. Well, Chiarelli and I both were told that the application was issued when we were in Juneau. Therefore, I left.

Q. Now, wait a minute, just a minute. Just a minute now. Will you say that again, please. I am sorry. I just wasn't listening. I was thinking about something else. It went over my head.

A. Well, we were told by Mr. Hill or led to believe that the commitment was issued at least, and we know that it was issued and therefore, I

(Testimony of A. E. Waxberg.)

come back up here to Fairbanks to take care of some other stuff that I had to do.

Q. When were you told that the commitment was issued?

A. When we were in Juneau. I never even went to the office of the FHA in Juneau. Mr. Sumter and Mr. Hill and Mr. Staples and Mrs. Hill took care of all of that. [90]

Q. Mr. Hill told you in Juneau that the commitment was issued?

A. I was led to believe that anyway. He must have told me. I can't remember now, but I was led to believe that the commitment was issued.

Q. But you were only in Juneau with Mr. Hill on one occasion?

A. As I recall it was only on one occasion, yeah.

Q. You never did see a copy of the commitment?

A. I did not.

Clerk of Court: Defendant's Identification C.

(FHA commitment was marked Defendant's Identification C.)

Q. (By Mr. McNabb): Now, if the application were submitted when you and Mr. Chiarelli and Mr. Hill, Mr. Sumter went to Juneau, and the application is dated the 31st of January and the commitment was not issued until late in February, Mr. Hill could not have told you that the commitment was issued, could he?

A. How was that again.

Q. I say if the only time that you went up there to Juneau was at the time that the application was

(Testimony of A. E. Waxberg.)

submitted and you were there on the 4th of February apparently, and if the commitment were not issued until as you say late in February, Mr. Hill couldn't have said to you that it was issued, could he?

A. Well, I can't remember the dates. That is entirely [91] possible. I know it was in Juneau with Mr. Hill and as I said before when the commitment was issued. We had all the specifications. We had the preliminary drawings, enough so that the commitment could be issued.

Q. What specifications now are you talking about?

A. Well, there was what the building, how the building was to be constructed, materials and so on and so forth.

Q. Those are the specifications that accompanied the preliminary drawings? A. Yes.

Q. Did you see a copy of those?

A. Well, yes, I did.

Clerk of Court: Defendant's Identification D.

(Specifications were marked Defendant's Identification D.)

Q. (By Mr. McNabb): I hand you the Defendant's Identification C now, Mr. Waxberg. What is that? A. Commitment for insurance.

Q. What is the date on that?

A. I guess you will have to show me the date on that. I guess it is on the back side. That is February 24th. It is R. P. Hill and myself, sponsor.

Q. So then?

(Testimony of A. E. Waxberg.)

A. And that is the commitment. [92]

Q. This is the commitment, you know that to be true? A. Yes.

Q. Or a copy of the commitment?

A. A copy of the commitment.

Mr. McNabb: The Court would like to see this?

The Court: You are not offering this?

Mr. McNabb: Not at the moment.

Q. (By Mr. McNabb): Now, I will show you Defendant's Identification D and ask you if you know what that is, please?

A. Yes, this is an outline of the specifications.

Q. Is that a copy of the specifications that was submitted? A. With the application.

Q. With the application? A. Yes.

Q. And were these preliminary drawings?

A. I believe so, yes.

Q. Now then, at the time that the application was submitted, Mr. Waxberg, let me ask you this, according to your present recollection when was the application submitted?

A. I guess it was the first part of February, somewhere in there.

Q. About the time that the application form is dated? A. That's right.

Q. And at that time these specifications were submitted, [93] these are the only specifications that had been prepared and these were the drawings? A. As far as I can recall.

Q. Now, at that time that was just about the time that you went to Juneau, wasn't it?

(Testimony of A. E. Waxberg.)

A. That I couldn't say. I don't, I didn't, I'm quite sure I didn't go to Juneau in the first part of February. It was in March when I was in Juneau or when the commitment was issued when I went to Juneau. As I recall it. I am, I may be all mixed up. This is so long ago that I can't remember dates and just how.

Q. Let me ask you this, do you know whether the commitment which is dated the 24th of February was based upon these preliminary drawings and these specifications?

A. I would say no. The, it was nowhere, this was for the application and the specifications had to be more clear. We had to get to more specific figures than what we had to submit with the application because I worked on that for quite some time with Chiarelli and Kirk before that was worked to a point that the commitment could be issued.

Q. Do you mean by your testimony then that the application, these drawings, these specifications were not sufficient for the FHA purposes?

A. Not all together. Not for issuing a commitment because I certainly wouldn't be working down there for fourteen days or whatever time it was that I was working there with them at that [94] one particular time in order to get the commitment issued.

Q. Do you believe that there was something more submitted to the FHA people than these?

(Testimony of A. E. Waxberg.)

A. Well, there had to be, there was. May I see that paper again.

Q. This outline of specifications?

A. Yes. Yes, there was quite a bit more.

Q. What more was there?

A. Well, there was another form submitted I'm sure of.

Q. What else now, what other form?

A. Well, I don't remember but this, this is just a general outline of the specifications.

Q. Do you think that more specifications than these were submitted?

A. Well, I don't remember but it seemed to me they would have to be. This is just a general outline for the application of the loan insurance.

Q. Now, on the application there is a list of exhibits, were those things submitted, right here?

A. They no doubt were. I don't recollect, but I imagine they were. It is on the list of exhibits.

Q. Do you think that something more than those things were submitted prior to the—(Interrupted)

A. Prior to the commitment.

Q. To the issuance of the commitment? [95]

A. I don't know.

Q. You do not know whether there was anything more? A. I don't recall.

Q. Now then, do you recall when you went back to Seattle after you returned to Fairbanks following your trip to Juneau?

A. Yes, I remember going to Seattle.

Q. But you do not recall when?

(Testimony of A. E. Waxberg.)

A. Well, it was some time after the commitment was issued.

Q. You did not go back then again until after the commitment was issued?

A. No, not that I can remember. It is awfully hard to remember four or five years back.

Q. The commitment shows the date of the 24th of February, does it? A. That's right.

Q. So it was late in February or very early in March when you went back? Why did you go back down there, Mr. Waxberg?

A. Let's see, that was, well, I am confused on my dates and the time and why I went down there. I know the last time that I went down there is when I found out that I was out of the picture.

Q. I know. Let me ask you though why did you return to Seattle after the commitment was issued?

A. As I recall I heard through the grapevine that I was out of the picture. I went down to find out about it. [96]

Q. Now, it would appear from the hotel receipts that you must have arrived down there on the first of March or the 28th of February?

A. It appears that way.

Q. You stayed at the New Washington according to this bill just two days, March the 1st and March the 2nd. Do you know where you went then?

A. No, I don't remember.

Q. But it would appear from this bill that you went back to Seattle on the 6th. Now, do you know

(Testimony of A. E. Waxberg.)

whether you came back to Fairbanks in that period or where did you go?

A. I don't remember. I was there from the 8th to the 15th according to this.

Q. What did you do on this trip, do you recall, on either one of these trips?

A. Well, I was just working on this, on this particular project.

Q. But the commitment had been issued at that time?

A. Well, that is vague as far as I recall. I was working on it anyway.

Q. Do you know what you did?

A. I was working mostly with Chiarelli and Kirk and I also contacted suppliers and equipment companies and so forth.

Q. Now then, up until the date of the issuance of the commitment which was the 24th of February, you do not now recall [97] when you received notice or word that the commitment had in fact been issued?

A. No, I can't remember exactly on that.

Q. But if we are to believe that you went back to Seattle at the time the commitment was issued, it must have been about the first of March?

A. It could be.

Q. Now, according to the evidence that we have, you were in Seattle on the 29th of January and in Juneau on the 4th of February, and at that time these are the only plans we have, is that true?

(Testimony of A. E. Waxberg.)

A. It must be.

Q. And I believe that you said yesterday that you would not have bid on any job, no contractor would have bid on any job on the basis of such preliminary specifications and preliminary drawings?

A. Well, you must remember that this is not bidding on a job. This is strictly promoting enough plans and specifications in order to obtain an FHA mortgage and this is not bidding on it. It is just helping Mr. Hill get this FHA mortgage is what that, that is all that is.

Q. So actually up to that time you had no firm agreement with Mr. Hill to build any kind of a building, did you?

A. Well, certainly I did. I wouldn't go down to Seattle. I wouldn't have been working on this thing all the time. My name [98] wouldn't be on the commitment or the application if there hadn't have been some agreement and we had to hurry things in order to get under the deadline and if it hadn't been for that application and the commitment issued under the deadline there would be no Polaris Building today because there wouldn't have been an application in for a commitment issued which had been revised after the commitment was issued, I was through.

Q. Mr. Waxberg, the Polaris Building certainly is not the one for which the application was made, is it?

(Testimony of A. E. Waxberg.)

A. It has been revised. It was worked off of the original commitment.

Q. You told us several times yesterday that the application for this building, this building was to front on Second Street, on Lacey Street and on First Street, didn't you?

A. That is very true.

Q. So the Polaris Building is certainly not the one that the application was made for?

A. Absolutely not, but the commitment had been made for a certain sum of money and after I was out of the picture this same commitment was used for a revised building and if the—(Interrupted)

Q. Did you agree to build the building, the Polaris Building as it now stands for what you say here, a million and six hundred thousand dollars?

A. That has nothing to do with it. [99]

Q. Answer my question.

A. State your question again.

Q. Did you agree to build the Polaris Building as it now stands for a million six hundred ninety-four thousand three hundred seventy-six dollars?

Mr. Hepp: Just a minute, I object to the question. It is beyond the issues of this Court. There is nothing set up in the pleadings about the present Polaris Building. This was a claimed breach of contract in accordance with the original specifications and what was later built has no relation to this trial.

The Court: He may answer.

Q. (By Mr. McNabb): Did you?

(Testimony of A. E. Waxberg.)

A. No, I didn't. I wasn't involved in this Polaris Building.

Q. What building did you agree to build for a million six hundred ninety-four thousand dollars?

A. I didn't agree to build a building for any, for, we didn't have any specific figures set at the time.

Q. You couldn't have, could you, Al?

A. Well, no. I was to get six per cent of the commitment for the builder's fee on it and if I could make a hundred thousand on it, O.K. If I only made fifty thousand that was O.K. It would have to be O.K. but that is the reason I was there to see that the building would be outlined and the specifications so that we could construct a building for that amount of [100] money and make a reasonable amount of profit.

Q. At that time did you know the minimum FHA requirements?

A. As I recall I did, yes.

Q. And how did you know them?

A. Well, the FHA have forms and specifications that they issue that you can, to work by. I don't remember what they are now but I recall that they did have.

Q. And in the event that, let me ask you this, is it your statement that the FHA absolutely guarantees a builder a profit of six per cent of the construction cost?

A. They don't absolutely guarantee it. It is allowed the builder and on the application and the

(Testimony of A. E. Waxberg.)

breakdown of the cost and so forth it is set up. It is set up so much for the architect. He gets his fee and the contractor gets his.

Q. What you mean by that is that those amounts are allowable?

A. They are allowable, yes.

Q. But they are not guaranteed, are they?

A. No, they are not guaranteed, no.

Q. Fact of the matter is, when they make a commitment of this type it is to agree to guarantee a loan for construction? A. That's right.

Q. And if you can't build the building for any less than that or if it costs that much without any profit, that is too bad, isn't it? [101]

A. That's right. That is the reason I spent all this time to see that we get a building the specifications and so forth that, so that I could make a reasonable profit.

Q. Or at least make a profit, be able to construct a building?

A. Be able to construct the building and make a profit and we worked to the point of six per cent.

Q. Up to the time that these plans were submitted to the FHA there wasn't any price established, there wasn't any agreement, you were just trying to get something together that the FHA would loan money on, weren't you?

A. That's right.

Q. And consequently you having not gone to Seattle until the 29th day of January, there wasn't the most remote possibility that on the 16th of

(Testimony of A. E. Waxberg.)

January or on the 2nd day of February that you had agreed to construct any building for a million six hundred ninety-four thousand three hundred seventy-four dollars?

A. Well, we knew about how much money that the FHA would allow, but I don't remember how we arrived at the figure on that. That was before I even left here. Mr. Hill and I believe Mr. Orsini and myself had worked on that quite some time before this application was made.

Q. Now, do you now recall the amount of money that FHA would allow as a maximum per unit for an apartment?

A. I can't remember that figure, no. [102]

Q. Do you believe that if I were to call the figure to you that you would recollect it?

Mr. Hepp: Now, I object, purely repetitious, your Honor. He has gone through that point five or six times. I think we ought to go on to more constructive matters.

The Court: I believe it has been explored and I will sustain the objection.

Q. (By Mr. McNabb): Now, Mr. Waxberg, did you ever see the final plans and the final specifications for this building?

Mr. Hepp: I object to that unless counsel defines what building he is talking about.

The Court: I think that is true. We would like to know what counsel means by "this building".

Q. (By Mr. McNabb): The building that you apparently agreed to build?

(Testimony of A. E. Waxberg.)

A. Agreed to build? No, I never saw, I never knew that they were finished. In fact, I believe they were never completed.

Q. They never were completed?

A. I don't believe so, not to my knowledge.

Q. Were they even started to your knowledge?

A. As I recall it, the architect was working on them to complete them and was called off, discharged by Mr. Hill.

Q. Do you know in fact whether Chiarelli and Kirk did anything at all after the commitment was issued? [103]

Mr. Hepp: Now, I object to that. There is no showing before this Court that this witness would know what Chiarelli and Kirk did about any matter. I think it is an unfair question.

The Court: He can answer whether he knows.

Mr. Waxberg: I don't know.

Q. (By Mr. McNabb): What, this is an application which is the Defendant's Identification B. What is the amount of money that was applied for to build the building?

A. One million seven hundred eighty-two thousand.

Q. Do you have any recollection now of what was to be done with the balance of money or the difference between a million seven hundred eighty-two thousand and one million six hundred ninety-four thousand? A. No, I don't.

Q. Do you know why an application was made for a million seven hundred eighty-two thousand?

(Testimony of A. E. Waxberg.)

A. Well, I believe it was based on some apartments and so many types of apartments at a certain price per apartment, but I don't recall. I am quite sure that that is the way it was based. How we arrived at that figure, but I don't recall the figures.

Q. Mr. Waxberg, how did you arrive at the figure of one million six hundred ninety-four thousand three hundred seventy-four dollars?

A. That I don't remember. I was working with Chiarelli and Kirk on that and we worked up those figures, but how we [104] arrived at them now I don't remember.

Q. If on the date of the application a loan was requested of a million seven hundred eighty-two thousand dollars, do you know now why you didn't specify that as the agreed price to build the building?

A. That I can't remember. We were working on it and we got the price to where it is on the commitment. How we arrived at that I don't know. I wasn't following the paper work too much. I was trying to get the specifications, design of the building to where we could make a reasonable profit.

Q. Now then, the figure on the commitment February 24th was the figure that the commitment was issued for?

A. One million six hundred ninety-four thousand two hundred dollars.

Q. Of course, on one we have a variation of about ninety thousand dollars, that is ninety thousand dollars in the price that you allege that you

(Testimony of A. E. Waxberg.)

agreed to build the building for on the application and on the other after the commitment was issued on the 24th of February the price of, the price difference is only in the amount of a hundred seventy-four dollars. Yet prior to the time that this commitment was issued on the 24th of February there is no showing any place that the figure close even to a million six hundred ninety-four thousand dollars was ever even mentioned?

A. I can't remember that part of it. [105]

Q. Is it not possible that this million six hundred ninety-four thousand three hundred seventy-four was arrived at after the commitment was issued?

A. I wouldn't know.

Q. Well, that seems reasonable though, does it not?

A. I wouldn't know.

Q. You say on the 2nd day of February, that is you allege in the complaint that the figures one million six hundred ninety-four thousand three hundred seventy-four, and just perhaps on that very day or a couple days later when you were in Juneau you submitted an application to the FHA for a figure ninety thousand dollars higher than that, and your name was attached to it.

A. I can't remember what the changes were on the deal and I wasn't working alone on this. I didn't fill those forms out. I was working with the architect and Mr. Hill. We were all working together on it and it is impossible for me to remember what changes took place, or how they took place.

(Testimony of A. E. Waxberg.)

Q. Where were you on the 2nd day of February, 1950?

A. I don't know. I couldn't tell you.

Q. You do know, though, that the preliminary plans are all you had?

A. As I recall.

Q. When did you agree with Mr. Hill to build a building for one million six hundred ninety-four thousand three hundred seventy four dollars? [106]

A. Well, when the application was made or the commitment was issued. I was working, we had an agreement to start off with. That is why I went to Seattle and worked with the architect on this that I was to be the builder and that agreement stood as far as I am concerned.

Q. What was the price that you agreed on?

A. We didn't come to any particular, when we started out we didn't know whether it was going to be two million or three million or what it was going to be. I was to be the builder and we had to promote, we had to get the money from the FHA.

Q. You knew that that was where the money had to come from?

A. Certainly.

Q. That was the only source of funds?

A. That was the only source of funds.

Q. You didn't have the money; Rudy didn't have the money; the only person that had the money was the government and you had to get it?

A. Rudy asked me to help him get it to work with him on it.

Q. Al, what was your agreement if you didn't ever get this thing through. A lot of applications

(Testimony of A. E. Waxberg.)

for FHA loan has gone in and nobody ever, a commitment was not issued, you know that, don't you?

A. I don't know. I know that this commitment was issued.

Q. I know, but what was your agreement if it didn't go? You told me yourself you were working against a deadline. [107]

A. Well, there was nothing said about if it didn't go through.

Q. That wasn't even discussed?

A. No, it was never even talked about.

Q. There was a reasonable possibility that it wouldn't go though, wasn't it? A. Yes.

Q. Something definitely to be considered?

A. That's right.

Q. On the basis of these plans you didn't know whether there would be a commitment for that building or any building; had no assurance?

A. Well, we applied for a commitment, yes.

Q. But you had no assurance at the time you made the application that the thing would actually go through, did you?

Mr. Hepp: I object to further questioning on that, it doesn't seem to be within the issues. The commitment was issued.

The Court: Overruled. He may answer.

Mr. Waxberg: State the question again.

Q. (By Mr. McNabb): I say, you had no assurance at the time you made the application nor actually until the very day that the commitment was in fact issued, that it ever would be?

(Testimony of A. E. Waxberg.)

A. Well, we were more or less led to believe by the FHA that it would be issued providing we could get a, get the [108] specifications and so forth acceptable to the FHA.

Q. Who told you that?

A. FHA man in Seattle told Hill and— (Interrupted)

Q. Were you there at the time?

A. I wasn't there at the time. Mr. Hill was taking care of that phase of it. All I was doing was working with the Architect on the deal, trying to get this thing ready so that it could be submitted.

Q. So the application could be made?

A. Submitted for a commitment.

Q. And actually the commitment was issued where? A. Juneau as far as I know.

Q. And you tell us you didn't even go to see Mr. Staples, the FHA man, in Juneau?

A. Oh, yes, I saw him.

Q. Not at the time the application was issued?

A. I can't remember.

Q. Well, you said yesterday that you didn't even go up to the office, that you were just there?

Mr. Hepp: I object to that as argumentative. All he testified was he didn't go up to his office with Mr. Hill. Now counsel has put words in his mouth and said he didn't even see him.

The Court: That is correct. Sustained. You can ask him whether or not he saw Mr. Staples. [109]

Q. (By Mr. McNabb): Did you see him in Juneau? A. Yes.

(Testimony of A. E. Waxberg.)

Q. Mr. Staples? A. Yes.

Q. Did you discuss the building?

A. Certainly.

Q. What did he say to you?

Mr. Hepp: I object to further questioning as repetitious. We have gone through all that matter yesterday.

The Court: Overruled. He may answer.

Mr. Waxberg: I don't remember the discussion, talking with Mr. Hill, Mr. Sumter, myself and Mr. Chiarelli.

Q. (By Mr. McNabb): Where did that conversation take place?

A. I don't remember if it was in the hotel lobby or, I can't remember but certainly we came to see him and met him.

Q. And you did discuss the building?

A. Obviously must have. That is what we came up there for.

Q. But the big discussion concerning the submission of the application, do you know where that took place?

A. No, I don't. I wasn't interested in that part of it. I was leaving that all up to Mr. Hill.

Q. So you had the discussion that you had with him was merely on a friendly basis as a social proposition, is that right?

A. Well, I wouldn't say that. [110]

Q. What was it then?

A. Well, I was just one of the company and one

(Testimony of A. E. Waxberg.)

of the sponsors and just because I didn't present the papers, why I can't say that I didn't go up there on business pertaining to this building.

Q. Oh, of course not. I think that is rather obvious, but you said yesterday that you didn't go to his office?

A. No, I didn't. Mr. Hill and Mr. Sumter went to his office.

Q. And I am trying to find out now what the nature of the discussion was that you did have with him?

A. I can't remember that.

Q. You don't know or do you know whether he told you that this commitment will be issued?

A. I can't remember that.

Q. Now, Mr. Waxberg, in the second paragraph of your second amended complaint, you say that on or about the 16th of January you agreed to construct a building under 608. Now at that time you were in Fairbanks and Mr. Hill was in Seattle, is that true?

A. That I don't know. I don't know where Mr. Hill was.

Q. Where were you?

A. I was in Fairbanks.

Q. Was Mr. Hill in Fairbanks?

A. I don't remember.

Q. You recall that Mr. Hill went out before Christmas?

A. That I don't remember. You asked me that question yesterday and I, I don't remember. I remember Mr. Hill going out [111] some time and I

(Testimony of A. E. Waxberg.)

met him in Seattle, but when that was, that could have been April or May, I mean.

Q. Do you then now believe that you had a discussion with him or did you agree in writing to construct a building?

A. We had nothing in writing. This is all verbal.

Q. Well then, do you believe that this agreement was entered into by a telephone conversation or an oral agreement during a personal conversation or how, what happened on the 16th of January when you agreed to construct a building under 608?

A. Oh, well, I don't know.

Q. You don't have any present recollection of that?

A. Well, I know I agreed to help him get this FHA deal through and I was to be the builder on it.

Q. Yes, but at that time and even on the 2nd of January, or the 2nd of February you say in accordance with the oral agreement of the 16th of January you agreed to construct a building for a million six hundred ninety-four thousand three hundred seventy-four dollars. Now, apparently you were in Seattle on the 2nd of February?

A. Well, those dates, the, it dates back so far that I just can't remember any of those.

Q. Well now, let me ask you this, this complaint you saw and verified on the 20th day of November of 1951. Now, surely within a year and a half you must have recalled, you must have known then

(Testimony of A. E. Waxberg.)

whether these dates were accurate or not? [112]

A. They should have been substantially accurate, yes.

Q. Now, you say on the 2nd of February you agreed to build a building for one million six hundred ninety-four thousand dollars and your application dated the 31st of January, two days previously and delivered to Juneau early in February was for a million seven hundred eighty-two thousand. Now, I would like you to explain to me how you arrived at one million six hundred ninety-four thousand, which is eighty thousand dollars less or nearly ninety thousand dollars less than the amount that the application was made for?

Mr. Hepp: Now, I object to the question. There is no showing that this man filed that application. He stated that he didn't have anything to do with these forms and there is no reason to know that this witness would know the answer and I think counsel is just trying to confuse him and ask unfair questions to exhibit a response that might prejudice this man in front of the jury. I think that matter has been gone into. It is actually beyond the issues here.

The Court: I think the witness should be allowed to explain, if he can. I think the inquiry is proper. I will overrule the objection. At this time we will take a, I don't like to interrupt the examination. It is nearly ten minutes past eleven and members of the jury, I ask that you heed the admonition I have previously given to you. We will take a ten minute recess. [113]

Clerk of Court: Court is recessed for ten minutes.

(Thereupon, at 11:10 a.m., the Court took a recess until 11:20 a.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Do the parties wish to stipulate that the jurors in the box are the jurors duly impaneled and sworn to try this cause?

Mr. McNealy: Yes, your Honor.

Mr. McNabb: We certainly will.

The Court: Very well.

A. E. WAXBERG

the witness on the stand at the time the recess was taken, resumed the stand for further cross examination.

Q. (By Mr. McNabb): Now, Mr. Waxberg, to pursue this proposition just a little bit further, you say that, of course, your memory was probably more accurate at the time that this second amended complaint was filed than it is now, is that not true, the second amended complaint having been subscribed by you on the 20th day of November, 1951? A. I suppose, yes.

Q. Now then, it says here in the second paragraph of your first cause of action on the 2nd day of February, 1950, you agreed to construct a building for one million six hundred ninety-four thousand dollars. That was practically on the day that the [114] application was submitted, just a day or two later and the application was for a million sev-

(Testimony of A. E. Waxberg.)

en hundred eighty-two thousand. Do you have now a recollection of how you arrived at the one million six hundred ninety-four thousand when the commitment which you signed and which bore your name was for ninety thousand dollars more?

Mr. Hepp: I object to it as repetitious. He has asked the witness that four times that I recall now, your Honor.

The Court: I overrule the objection but I believe counsel is it not true that the language is on or about.

Mr. McNabb: Indeed it is, sir.

The Court: I think you confined it to the exact date. You may rephrase your question and I will permit the witness to answer.

Q. (By Mr. McNabb): Well, how did you arrive on or about the 2nd day of February at the figure one million six hundred ninety-four thousand three hundred seventy-four dollars?

A. That I don't recall. Evidently I assumed that that was the cost of, or the FHA mortgage for the construction of the building.

Q. But there was no FHA mortgage at that time?

A. Well, we were working on those figures.

Q. But the application that you submitted practically simultaneously with your alleged agreement, that is on or about [115] the 31st of January was for about ninety thousand dollars more, eighty-eight thousand.

Mr. Hepp: Now, I object to the question. There

(Testimony of A. E. Waxberg.)

is no evidence before this Court that he, this witness submitted that application. I don't think that the question is a fair one and I think that counsel should withdraw from arms length.

The Court: That is correct. That assumes that this witness compiled the application. There is no evidence to that effect. I will sustain the objection.

Q. (By Mr. McNabb): Were you a party to the application for the loan?

A. My name was on the application, yes. As I told you before I had very little to do with the paper work on that. My name was on it and that was as far as I, Mr. Hill took care of that phase of it. I figure if he put his name on it my name is O.K. to put on, too.

Q. You didn't know about the application having been filed?

A. Oh, I knew the application was being filed, certainly.

Q. You said this morning that you had seen a copy of it?

A. Well, as I recall I did. I must have, yes.

Q. But you had not seen anything at that time with the figure even close to the one which you allege you agreed to construct the building for?

A. Well, that was a long drawn out period of juggling figures here and in Seattle and back and forth and it would be [116] impossible for me to remember how it come about that we arrived at that figure. I probably assumed that that was the

(Testimony of A. E. Waxberg.)

FHA commitment because I don't believe, I never did see the commitment. Never was able to get the figure of the commitment. However, my name was on it. That might sound kind of foolish but that is exactly what happened.

Q. You never did get the figure that the commitment was issued for?

A. I never even got a copy of it. I even wrote to Juneau to get a copy of the commitment or the price of the FHA commitment but it was withheld from me.

Q. Do you believe now that it is pure happenstance that you came within a hundred seventy-four dollars of stating in your second amended complaint the amount of money for which the commitment was issued?

Mr. Hepp: I object to that as calling for purely speculation, what he now believes, saying something was happenstance. He said he figured this thing out. His figures were quite accurate.

The Court: I don't wish to preclude the cross examination as to how the plaintiff arrived at that figure and I will overrule the objection.

Mr. Waxberg: Well, I can't say how I come to that figure. I had it pretty well in mind what the commitment was but I was never allowed to see what it was. After I left Juneau [117] I figured that I would get a copy of the commitment as I was one of the sponsors on the deal, but I was knocked out of the picture entirely and this figure of one million six hundred ninety-four thousand, whatever

(Testimony of A. E. Waxberg.)

it is, is possibly as close as I could recollect that the mortgage would be.

Q. You mean that the mortgage was for, after the commitment was issued?

A. For, yes, that's right.

Q. So you believe now that you arrived at your one million six hundred ninety-four thousand figure from the commitment?

Mr. Hepp: Now, I object to that. That is a misstatement. He says he arrived at that from the basis of calculations. It is a matter of coincidence. I think that counsel is being unfair with this witness.

The Court: He may answer, overruled.

Mr. Waxberg: Well, as I say, it is so long ago that I can't tell you.

Q. (By Mr. McNabb): But that, is that not a reasonable assumption, Al?

A. Well, I was certainly involved in it all the way through and to remember the exact figures and how I arrive at them now, I don't know. It would be impossible for me to.

Q. Let me ask you this, do you now believe that you arrived at your one million six hundred ninety-four thousand figure after the commitment of one million six hundred ninety-four thousand came out?

A. No. I knew that the mortgage was for a certain amount and that we had worked up to that figure.

Q. When did you know that?

A. Well, that I don't remember. All I remember

(Testimony of A. E. Waxberg.)

is that I was involved in the deal from start to finish until the commitment was issued and how these figures come up and when they come up I can't answer. It would be impossible for me to answer intelligently.

Q. Let me ask you this then, do you believe now that at about the time you went to Juneau with the application for insurance and, or for an FHA loan on or about the 2nd day of February you agreed to build a building for one million six hundred ninety-four thousand dollars?

A. I don't remember. I wouldn't know.

Q. You just don't know whether you did or not?

A. No, I don't.

Q. Do you believe now that you ever agreed to build the building for which the application was submitted for a million six hundred ninety-four thousand dollars?

A. No, I don't believe I agreed to build it for that, no. I agreed to build a building but not for that specified amount.

Q. How much did you agree to build it for?

A. There was no specified amount that I would build it for. When this commitment was made the drawings were not completed and it would be impossible to know exactly what the, what I could construct the building for. [119]

Q. You mean by that that you would have required the final specifications, final specifications and the final drawings before you could ever have agreed on a price?

A. That's right.

(Testimony of A. E. Waxberg.)

Q. That is pages and pages of mechanical and plumbing and structural and electrical, those various items? A. You would have to.

Q. You would have to have detailed blueprints?

A. Have to.

Q. Detailed specifications before you could ever have agreed on a price?

A. But you must remember that I was working on that and to get the specifications of the building down to a price where I could build this building for less than the mortgage and that I would be able to get the reasonable profit and that is where I was spending my time.

Q. But now you say that you were kicked out of this thing. At the time that you were kicked out, had the final plans and the final specifications been drawn? A. No.

Q. At that time about as far as had been advanced was these drawings and these preliminary specifications and the commitment had been issued?

A. That's right.

Q. That is just about all that had been accomplished up to [120] that stage of the proceedings?

A. Yes. Then when I come to Seattle, I don't remember what time it was, but I came to Seattle and went into Chiarelli and Kirk's office to start to discuss this thing. I hadn't talked to Mr. Hill yet and Mr. Chiarelli informed me he could not discuss this building or this project any further with me.

Q. Al, did you ever after the commitment was

(Testimony of A. E. Waxberg.)

issued and prior to the time or about the time that you were kicked out, did you ever discuss actual dollars that you would require to build the building?

A. No, we had never, we had never entered into that phase of it.

Q. No, I say though after the commitment was issued and before you were kicked out, did you ever talk dollars to Rudy?

A. No, other than what, I remember one discussion about that if, I was to kick back fifty thousand dollars to him.

Q. What is the, do you know whether the property, the land upon which this building was to be constructed was free and clear, was it in Rudy's name?

A. It was not all free and clear, no.

Q. You know that?

A. Well, I, I didn't see it in black and white, but I gathered that in the conversation, yes.

Q. You know that part of the ground, or did you ever know or believe that part of that ground was just under an option? [121]

A. Well, it was, I don't know about that. I do know that the ground was, with the application why it, I was led to believe as well as all others that the ground could be cleared for a building.

Q. Yeah, otherwise you certainly would have never made application, would you?

A. Well, no.

Q. Al, you worked with Chiarelli and Kirk and

(Testimony of A. E. Waxberg.)

were in Seattle on these various trips, the moneys that you expended and the time that you consumed, you were supposed to have been paid from that from your normal builder's profit, were you not?

A. Well, that is a different deal. I can bid on jobs and never get the money as far as that goes, and that is expense that I have to stand. It is part of my business.

Q. I say though, in this instance you were supposed to recover your costs for these trips to Seattle and the time that you spent with Chiarelli and Kirk and the like from the profit, from your builder's profit on this thing, were you not?

A. Well, yes, I expected to when the building was done why I would be.

Q. That is where you were to be repaid for any moneys that you expended? A. That's right.

Q. Any time that you lost, normally you spend time and money preparing to build these things, for instance like the [122] Nenana School, don't you?

A. That's right.

Q. And it is a part of normal, natural business expense? A. That's right.

Q. And you are paid for that in whatever profit you make on the job? A. That's right.

Q. And that is what was anticipated in this case, you and Rudy are going in together, build this building, you were going to build the building and any expenditures the same as Rudy spent his time on the thing, to you by way of the profits in build-

(Testimony of A. E. Waxberg.)

ing the building, to him by ownership in the building?

A. Well, this is a little different situation. Had Rudy come with plans and specifications, this building as it is now, how much will you build this building for and I give him a figure then I am out, but I helped promote this deal.

Q. I know you did.

A. And it is all together different than normal contracting operations.

Q. But how were you to have been repaid if it wasn't from the building?

A. Well, that is how I was to be repaid, through the building.

Q. Through the contract, through the building, the construction of it? [123]

A. That's right.

Q. And you were supposed to get to build this building after the final specifications came out. That is why you are working down there with Chiarelli and Kirk so you could have the building designed at a lower figure so you could have some profit guaranteed? A. That's right.

Q. And at the time that you made your profit on the building you then would be repaid for all of the moneys that you had expended just the same as the labor that went into the building?

A. That's right.

Q. And there wasn't any agreement on Rudy's part to pay you for those expenses other than as it came back to you out of the building?

(Testimony of A. E. Waxberg.)

A. No, there was no agreement that I was going to be kicked out of there either after the commitment was made.

Q. But that is the way you were supposed to get this money back, wasn't it?

A. Well, yeah.

Q. From the building? A. That's right.

Q. How many discussions did you have, how many times did you see Mr. Hill after the commitment was issued, or did you see him at all?

A. I don't recall seeing him at all. [124]

Q. Well, now, Al, when was this discussion when he demanded the fifty thousand dollar kick-back?

A. Oh, yes, that's right, too. That was in New Washington Hotel, I remember that, but what date. That must have been after the commitment was issued.

Q. Did you see him any other time?

A. I don't remember. I remember trying to contact him.

Q. But you have no recollection now of having seen him?

A. Well, other than the one time.

Q. Who was present at that meeting?

A. Mr. and Mrs. Hill and Larry Orsini and myself.

Q. Why was Mr. Orsini there?

A. Well, he was staying in the same hotel and they had some business dealings with Mr. Orsini, too, in regard to this building.

Q. You didn't have any agreement or any busi-

(Testimony of A. E. Waxberg.)

ness dealings with Orsini in reference to the building?

A. Oh, yes, he helped fill out the papers he, I worked with him on the promotional deal, on the filling out these forms. He had a big part of it.

Q. Let me ask you, do you recall in the New Washington Hotel and at that meeting a discussion between you and Mr. Orsini and Mr. Hill concerning a management contract of the building for Mr. Orsini?

A. That, that was between Mr. Hill. I remember discussion, yes. [125]

Q. There was such a discussion?

A. That's right. Mr. Hill and Mr. Orsini in the beginning of this building why there was some kind of an agreement between them. I don't know just what it was. Evidently it stopped there at, that was the end of the agreement or whatever it was between those two.

Q. But there was a discussion of a management contract of the building for Orsini?

A. As I remember, yes.

Q. On that occasion?

A. Yes. As I recall, Mr. Orsini wanted to manage the building and had been led to believe that he could be manager of the building.

Q. And Mr. Hill refused to give him such a contract?

A. That's right. I was witness to that.

Q. And Mr. Orsini left the room? A. No.

Q. No?

(Testimony of A. E. Waxberg.)

A. I don't believe so. I believe Mr. and Mrs. Hill left the room.

Q. Do you recall any conversation concerning stock in the corporation that occurred at that discussion? A. I don't remember that.

Q. What? A. I don't remember that.

Q. Do you recall that Mr. Orsini and you discussed with Mr. and Mrs. Hill them selling or giving, or as a part of the contruction agreement to give you fifty-one percent of the stock in the corporation?

A. I don't know if it happened then, but it was that discussion had taken place and they, I don't know if it was going to be stock but it was money that I was to leave in there and they could repay me.

Q. No, no, I am talking about stock in the corporation, stock in the corporation as such?

A. I don't remember.

Q. You have no recollection of when you and Mr. Orsini and Mr. and Mrs. Hill were discussing this matter in the New Washington Hotel that there was a discussion concerning the issuance to you and or Mr. Orsini or the both of you of fifty-one percent of the corporate stock?

A. I don't recall.

Mr. Hepp: I object to the question. There is no evidence that that discussion even took place with that subject matter. Counsel here is testifying and asking this witness if he remembers whether or not. The impression he is putting in the minds of the

(Testimony of A. E. Waxberg.)

jury is that that actually did take place. There is no evidence here in this Court that it did take place. I don't think it is a fair question. In fact, it is not a question. It is a matter of testifying by counsel. The Court: I will permit it to stand.

Q. (By Mr. McNabb): Mr. Waxberg, do you have any recollection of a meeting with Mr. and Mrs. Hill in the, in Mr. Kellog's office?

A. Mr. Kellog?

Q. A lawyer in Seattle, just two or three days following the New Washington Hotel discussion?

A. Yeah, I believe I had a meeting around there. I don't remember what it was about but I— (Interrupted)

Clerk of Court: Defendant's Identification E.

(Yellow sheet of paper with certain writings thereon was marked Defendant's Identification E.)

Mr. Hepp: May we see the paper, counsel.

Q. (By Mr. McNabb): You do have a recollection of having talked with Mr. and Mrs. Hill in a lawyer's office?

A. Yes, but I don't remember when it was. I think it was, well, I don't remember when it was, but I remember.

Q. Do you remember Mr. Kellog?

A. I wouldn't even remember the name if you didn't recall it.

Q. But you do recall a discussion in a lawyer's office?

(Testimony of A. E. Waxberg.)

A. I believe it was, I have a faint recollection, yes.

Q. You recall that after the meeting in the New Washington Hotel that they called you and asked you to meet them in this [128] lawyer's office?

A. I don't remember that.

Q. This is Defendant's Identification E. Do you know what that is, Mr. Waxberg?

A. I couldn't say that I ever saw that piece of paper.

Q. Do you recognize the writing?

A. No, I don't.

Q. You recognize the figures on there. Are the figures on there yours?

A. It does look a little like my writing. The figures are somewhat similar. I couldn't swear that it was my writing.

Q. You think that it isn't your writing?

A. I couldn't say if it is or not.

Q. What did you discuss in Mr. Kellog's office?

A. I don't remember. I never even remembered discussing it in Mr. Kellog's office. Never even thought of it.

Q. From that day to this?

Mr. Hepp: May it please the Court, I can't hear counsel's questions very good. He is up visiting with the witness. I think he should talk so we can hear.

The Court: Yes, I think that counsel has a right to hear the questions. I would like you to speak up, Mr. McNabb, and I would like the witness to speak

(Testimony of A. E. Waxberg.)

up so members of the jury can hear everything that is said.

Mr. Waxberg: No, this is not my handwriting. The [129] figures might be my handwriting.

Q. (By Mr. McNabb): I am not interested in the handwriting as such. I am interested now only in the figures, are they yours?

A. Well, that I can't say. I don't know.

Q. You mean you don't know whether you wrote this thing or you don't know when you wrote it?

A. I don't know that I wrote it. I may have, but it don't seem to me that, I don't remember anything about this.

Q. Do you now know what the figures a hundred eleven thousand, eight hundred eighty is?

A. No, I don't recall.

Q. You don't have any idea? Do you now know what the figure one forty-four is?

Mr. Hepp: Just a moment, I object to further questions until this paper is identified, it is explained. I don't know this, do you know now.

Mr. McNabb: That is what I am trying to get the witness to do, Mr. Hepp.

Mr. Hepp: Let the Court rule on the objection.

The Court: I understand the document has been identified.

Mr. Hepp: It has been marked for identification.

The Court: The— (Interrupted)

Mr. Hepp: I have heard no identification where it came from or whom. [130]

(Testimony of A. E. Waxberg.)

The Court: The witness so far has failed to identify anything about it, but I believe that Mr. McNabb will have a right to pursue or ascertain what the witness does know about it so the objection is overruled.

Mr. Waxberg: Well, the figures here that you are asking me about someone else has written in here. I know that that isn't my handwriting.

Q. (By Mr. McNabb): I know that is isn't, too.

A. So my answer is, all I could do is read them off to you as you ask me. If this wasn't put in here I would not know those figures at all and I still don't know what the figures are.

The Court: Well, the witness has not identified anything as yet here, Mr. McNabb.

Mr. McNabb: I know that, Judge.

Q. (By Mr. McNabb): Do you know now what the figure eleven thousand eight hundred eighty dollars is?

A. No, I don't. I would never have recognized it and I still couldn't recognize it as the figure it says, you have written down here, you or someone has written in there.

Q. You don't know what it is? A. No.

Mr. McNabb: Your Honor, may we have the noon recess now. [131]

The Court: Any objections? Members of the jury, once more I admonish you to heed the admonition I previously gave to you not to discuss this case with anyone or among yourselves, and not to express any opinion thereon until the case

is finally submitted to you. You will, please, return to your places at two o'clock.

Clerk of Court: Court will recess until two o'clock.

(Thereupon, at 12:00 noon, a recess was taken until 2:00 p.m.)

Afternoon Session

(The trial of this cause was resumed at 2:00 p.m., pursuant to the noon recess.)

Clerk of Court: Court is reconvened.

Mr. Hepp: We will stipulate as to the jury.

The Court: Very well. The plaintiff has stipulated that the twelve members in the box are the jurors duly sworn and impaneled to try this case.

Mr. McNabb: As will the defendant.

The Court: Very well.

A. E. WAXBERG

the witness on the stand at the time the recess was taken, resumed the stand for further cross-examination.

Q. (By Mr. McNabb): Mr. Waxberg, at the time that you made application or the application was made for a commitment under the Section 608, was there a, was there to your knowledge a requirement that the [132] builder or the contractor be bonded?

A. Well, yes, at the time whenever the, whenever the plans and specifications were out so that

(Testimony of A. E. Waxberg.)

you would know what to be bonded for. You couldn't pick a figure out of the skies and say you want bond for so much.

Q. Well, you knew that the building would run probably a minimum of a million and a half at any rate, didn't you? A. Yes.

Q. Did you make any effort to determine whether or not you could secure such a bond?

A. Well, in a manner I did. I was approached by a man from the National, or Washington Mortgage Company that I should bond with them providing this job went through, providing we got the commitment as I recall it.

Q. Who did you talk to?

A. I believe I talked with Mr., well, he was here yesterday, what's his name?

Q. Sumter? A. Sumter, yes.

Q. Did you talk to anybody else?

A. Well, I don't know who else was in his office.

Q. The bonding discussions that you had were limited? A. They were limited.

Q. To those of Mr. Sumter?

A. I believe he, as I recall it he said that with my [133] statement he couldn't bond this particular job so on and so forth. I wasn't even asking. It was him that was asking me for a statement that he could handle the bonding. I believe I presented the statement to him. However, I wasn't bonding with those people at all. Never tried to get a bond.

Clerk of Court: Defendant's Identification F.

(Testimony of A. E. Waxberg.)

(Financial statement of A. E. Waxberg was marked Defendant's Identification F.)

Q. (By Mr. McNabb): You say the only discussion concerning your bonding capacity in reference to this job was with Mr. Sumter?

A. Yes, I never made any request for my, of the bonding company that I normally do business with because I didn't know how much I was going to have to bond for.

Q. Prior to this time had you secured any bonds, contractors' bonds?

A. For different, well, yes, I have been bonding with, for several years before that.

Q. Prior to, prior to January of 1950?

A. Yes.

Q. What was the largest bond that you had ever secured at that time?

A. I don't know. I believe it was around, between two and three hundred thousand.

Q. I hand you Defendant's Identification F and ask if you [134] know what that is, please?

A. This is a, it is a financial statement. However, this is a personal financial statement, not a company financial statement.

Q. That is your financial statement?

A. Yes, at that time.

Q. Do you know why this was prepared?

A. Well, it was requested by Mr. Sumter that I, as I recall it now, that I get a financial statement but as far as bond is concerned, why I was never required to get a bond.

(Testimony of A. E. Waxberg.)

Q. Did you discuss with Mr. Sumter your bonding capacity? A. I believe I did, yes.

Q. What did he say to you in that regard?

A. Well, he said that I didn't have a statement that would warrant a bond of one million six hundred thousand.

Q. This was a, this constituted a true and correct statement at that time of your assets and liabilities?

A. That is what it was, yes. However, I was never requested to get a bond.

Q. Yes, I know.

A. And I could have gotten a bond.

Mr. McNabb: We have no further questions at this time.

Redirect Examination

Q. (By Mr. Hepp): Mr. Waxberg, were you able to locate any more checks or [135] other writings as evidence of your expenditures?

A. No, not other than what I have. Not other than what you have there.

Mr. Hepp: If you would be so good, Mr. Clerk, as to put these together I think it will save time and mark them all for identification, one identification.

Clerk of Court: Plaintiff's Identification 8.

(Certain statements were marked Plaintiff's Identification No. 8.)

Q. (By Mr. Hepp): Would you go through these parts of Plaintiff's Identification No. 8 and

(Testimony of A. E. Waxberg.)

I believe they are one, two, three, four, five, six, seven in all.

Mr. McNabb: May we see them, please.

Mr. Hepp: Excuse me.

Q. (By Mr. Hepp): Would you examine them, please?

A. Well, the first one is a check issued on March 6th to Pan-American Airways, Inc., one hundred ninety-four dollars, fifty-eight cents; and this is one January 1950 to Larry Orsini for three hundred dollars. Here is one March 1st to Larry Orsini for two hundred dollars; one here February 22nd to Pan American Airways, two hundred sixteen dollars, twenty cents.

Mr. McNabb: I am going to object to any testimony concerning the next check until such time as it is shown that it is relevant. [136]

The Court: The Court is unable to rule but does counsel wish to make an offer of proof or do you wish to pass it, or—(Interrupted)

Mr. Hepp: This next one that counsel refers to and I counted it, it would be five.

Q. (By Mr. Hepp): Just yes or no, Mr. Waxberg, does that portion of this Identification bear on any expenses that you have paid in connection with the subject matter before this Court?

A. Yes.

Mr. McNabb: Object to that, leading and suggestive.

Mr. Hepp: Just yes or no.

The Court: He may answer.

(Testimony of A. E. Waxberg.)

Mr. Waxberg: Yes.

Q. (By Mr. Hepp): Would you state very simply the term, what is it? A. It is a check.

Q. Just tell me what it is, is it a paper, a writing, a check, a document or what?

A. It is a check.

Q. And to whom is that check payable, what does it say on it? A. It is payable to cash.

Q. Just yes or no, did you cash that check?

A. Yes. [137]

Q. To whom or by whom was that check cashed, if you know?

A. Pan American Airways.

Q. How do you know that?

Mr. McNabb: Wait just a minute. It bears his endorsement.

Mr. Hepp: Well, I am getting right to that, Mr. McNabb, if you will allow me.

The Court: I believe the witness has a right to explain if you will proceed.

Mr. Waxberg: It is a check for cash for two hundred dollars which I took to the Pan American Airways to buy a ticket to Seattle.

Q. (By Mr. Hepp): Are there any endorsements on the reverse side of that?

A. It is endorsed by Pan American Airways, Inc., and endorsed by me as well.

Mr. McNabb: I withdraw objection to it, missed that.

Q. (By Mr. Hepp): Would you continue on, now. That covers No. 5, I believe.

(Testimony of A. E. Waxberg.)

A. O.K. Then here is a check dated February 28th, 1950, to Pan American Airlines for one hundred eight dollars, ten cents, and endorsed by Pan American Airlines and here is a receipt from Williams Equipment Company in the amount of four hundred seventy dollars.

Q. Now, would you, with the exception of No. 5 against [138] which there was an objection later withdrawn, but still with the exception of that, what were these expenditures for, if you know?

A. It was for travel pertaining to this particular.

Q. And the ones to L. Orsini, were they for travel?

A. No, they were for, paying him for things that he did for me pertaining to this.

Q. Looking down here, Plaintiff's Identification No. 6, which you have identified as being a bill from Larry Orsini in the amount of five hundred dollars, would you state whether or not there is any relation between the two checks here totalling five hundred dollars, and that bill?

A. Well, yes.

Q. What relationship is there?

A. Well, professional services from January 1st to March 31st, '50, preparation of financial statement for FHA commitment No. 130-42016.

Q. Those two checks then, that is for the amounts of three hundred dollars and two hundred dollars?

A. Three hundred and two hundred.

(Testimony of A. E. Waxberg.)

Q. Make up the five hundred which you paid to Larry Orsini? A. That's right.

Q. I see. Here is Plaintiff's Identification No. 7 which you have identified as a bill from Williams Equipment Company? A. That's right.

Q. And—(Interrupted) [139]

A. Dated June 7th, 1950, and it reads, City of Fairbanks charge of January 31st, 1950.

Mr. McNabb: Oh, the thing speaks for itself. If he wants to admit it let it be admitted. Move its admission.

The Court: He hasn't offered it as yet.

Mr. Hepp: I merely started to ask a question and the witness started to explain that. It wasn't in response to any offer.

Mr. Waxberg: Pardon me.

Q. (By Mr. Hepp): Now, Mr. Waxberg, you state this is a bill for four hundred seventy dollars?

A. That is correct.

Q. I note in the identifications that you have just identified there is a, a paid bill of four hundred seventy dollars to Mr. Williams of Williams Equipment? A. Yes.

Q. Is there any relationship to that payment and this bill? A. Why, yes.

Q. What is the relationship?

A. Well, it is paid in full.

Q. Now, going back to this fifth part which was that check in cash, I believe you stated in the amount of two hundred dollars which contained Pan American's endorsement on it?

(Testimony of A. E. Waxberg.)

A. Yes. [140]

Q. Would you state if you know what that check was for?

A. Well, it was plane fare one way to Seattle.

Q. Do you recall how much that one-way fare was?

A. I believe it is about a hundred eight dollars, somewhere in there one way.

Q. And Pan American cashed that check for you? A. They did, yes.

Q. Did they return the balance, the difference between—(Interrupted)

A. Well, I got the balance, I wrote it out for two hundred because I probably was a little short of cash then, needed a little extra change.

Mr. Hepp: With the exception of Identification 3, which is the Baranoff Hotel bill which seems to be in dispute, I would like to offer into evidence Plaintiff's Identifications 1 through 8. That excepts in my offer No. 3.

Mr. McNabb: We have no objection to the Baranoff Hotel bill.

Mr. Hepp: I didn't offer it, your Honor.

The Court: He is not offering No. 3. Do you have any objection to the Identifications that counsel is now offering?

Mr. McNabb: Oh my, no.

Mr. Hepp: I don't know what the "oh my" is for, your Honor.

The Court: I want to explain to the members of the jury that this courtroom is so designed that

(Testimony of A. E. Waxberg.)

we cannot step out [141] from the bench and into Chambers conveniently for discussions that we wish to have in your absence and I don't like the whispering at the bench which has been taking place here previously and the only alternative I have, if I want to take up something with counsel in your absence is to discuss it, to excuse you for a few minutes and I ask that you heed the admonition that I previously gave you and will you, please, retire perhaps for five minutes. We will call you back.

(Thereupon, the jury withdrew from the courtroom and the following proceedings were had out of the presence and hearing of the jury):

The Court: Now, gentlemen, for my own enlightenment, I realize there is no objection to the offer made, but for my own enlightenment I would like to know under what theory Identifications 1 to 8 inclusive, excluding No. 3, under what theory they are offered.

Mr. McNealy: Those, your Honor, are offered there in connection with the second cause of, what primarily I would say the third cause and the second cause of action to show the outlay of expenses in the work done for the benefit of the defendants here. More particularly I believe that on a numerical basis rather than any other.

Mr. McNabb: If it please the Court, if I may assist at this time if the Court would like to hear from me in this regard. Since I voiced no objec-

(Testimony of A. E. Waxberg.)

tions to the admission of those items I [142] will waive any argument at this time.

The Court: Yes. Well, there being no objection to the offer of the exhibits the Court will receive them at this time. The jury may be called back.

(Thereupon, the jury entered the courtroom and the following proceedings were had in the presence and hearing of the jury):

The Court: Parties stipulate that all members of the jury are present?

Mr. McNabb: The defense will so stipulate.

Mr. Hepp: We will stipulate.

The Court: The Court at this time will receive into evidence Plaintiff's Identifications No. 1 to 8, inclusive, excluding Identification No. 3. That was your offer, was it not, Mr. Hepp?

Clerk of Court: Identification 1 is Plaintiff's Exhibit A; No. 2 is B; No. 4 is C; No. 5 is D; No. 6 is E; No. 7 is F and No. 8 is G.

(Plaintiff's Identifications No. 1 and 2 were admitted in evidence as Plaintiff's Exhibits A and B; Plaintiff's Identifications 4 through 8, inclusive, were admitted in evidence as Plaintiff's Exhibits C, D, E, F, and G, respectively.)

The Court: And I wish to state that No. 3 was not admitted because it was not offered, at least among other reasons. [143] There was no offer made, Identification 3. You may proceed, gentlemen.

Q. (By Mr. Hepp): Mr. Waxberg, since you have been in business as a building contractor, have

(Testimony of A. E. Waxberg.)

you ever been prevented from performing a bid in contract by reason of the fact that you couldn't obtain the necessary bond? A. No.

Mr. McNabb: I object to that as having no bearing on the issues of this case, improper redirect examination.

The Court: He may answer in view of the defense which has been interposed. It may stand.

Mr. McNabb: I would like to state this, anything that has occurred subsequent to the time herein in controversy is certainly not relevant to the issues here.

The Court: We could have the question read. I believe he was asked whether he was ever denied. What was your answer?

Mr. Waxberg: I said no.

The Court: Your answer was no?

Mr. Waxberg: No.

Mr. Hepp: We have no further questions.

Mr. McNabb: Nor have we.

(Witness excused.)

Mr. Hepp: We will rest the plaintiff's case.

Mr. McNabb: I would like to be heard, your Honor. [144]

The Court: In the absence of the jury?

Mr. McNabb: Yes, sir.

The Court: Members of the jury, once more I ask that you heed the admonition that I previously gave to you and perhaps it is going to be fifteen minutes before we will call you back. Fifteen minutes or longer.

Mr. McNabb: May we have a minute or two recess at this time.

The Court: Would you like one, too, Mr. Hepp? We will take a five minute recess.

Clerk of Court: Court is recessed for five minutes.

(Thereupon, at 2:30 p.m., the Court took a recess until 2:50 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: There is no juror serving on this case in the room at the present time. I believe we will have the doors closed, Mr. Bailiff, please. The only object in closing the door is to exclude the jurors who are serving on this case. Now, Mr. McNabb.

Mr. McNabb: Your Honor, we are perfectly willing to waive the reporting of this argument if the Court wishes, Court and counsel have no objection?

The Court: Well, I rather like to have the, all things stated in Court part of the record.

Mr. McNabb: May it please the Court, at this time we will, the defense moves for a directed verdict in favor of the [145] defendant first as to the entirety of the action as set out in plaintiff's complaint, that is directed toward the first, second and third cause of action and alternatively toward the first, second and third causes of action separately.

A recovery as we see it based upon the first cause of action is predicated entirely upon an express oral agreement. It is our position that the evidence is entirely contradictory in that regard, that there was and there has been introduced here no proof

whatever of an express agreement or an express contract between Mr. Hill and Mrs. Hill and Mr. Waxberg for the construction of the building. It is our contention that the testimony of Mr. Waxberg is precisely contradictory to that.

The following questions and the following answers were put to Mr. Waxberg, the following questions to which he answered as follows: Question, Now then, what you mean is you would certainly have not agreed to construct a building for a specific price on no more plans than those. Answer, "No".

The Court: Plaintiff's counsel have a copy of the transcript from which you are reading? Do you wish one, gentlemen?

Mr. McNabb: The question, "You wouldn't ever have done that, would you?". The answer, "No, you have to have specifications. That is just some drawings. They are nothing on it outside of an outline of it". Question, "No contractor in the world would have agreed to such a thing, would he?". Answer, [146] "No, and we submitted more. FHA wouldn't even consider an application". Question, "How much did you agree to build it for?". Answer, "There was no specified amount that I would build it for. When this commitment was made the drawings were not completed and it would be impossible to know exactly what the, what I could construct the building for". Question, "You mean by that you would have required the final specifications, final specifications and the final drawings before you could ever have agreed on a price". Answer, "That's right". Question, "That is pages

and pages of mechanical and plumbing and structural and electrical, those various items?". Answer, "You would have to". Question, "You would have to have detailed blueprints". Answer, "Have to". Question, "Detailed specifications before you could ever have agreed on a price?". Answer, "But you must remember that I was working on that and to get the specifications of the building down to a price where I could build this building for less than the mortgage and that I would be able to get the reasonable profit and that is where I was spending my time." Question, "But now you say that you were kicked out of this thing. At the time that you were kicked out, had the final plans and the final specifications been drawn?". Answer, "No". Question, "At that time about as far as had been advanced was these drawings and these preliminary specifications and the commitment had been issued?" Answer, "That's right". Question, "That is just about all that had been accomplished up to that stage of the proceedings?" [147] Answer, "Yes. Then when I come to Seattle, I don't remember what time it was, but I came to Seattle and went into Chiarelli and Kirk's office to start to discuss this thing. I hadn't talked to Mr. Hill yet and Mr. Chiarelli informed me he could not discuss this building or this project any further with me."

Now, your Honor, the testimony of the plaintiff, he would not under any circumstances have agreed to construct this building by the time that he was disassociated or no longer associated with Mr. and Mrs. Hill. That is the testimony of the plaintiff,

that there never was an agreement at any time reached to construct any building, principally for the reason that there had been no plans and specifications which a contractor, any contractor could have used as a basis for determining a price. In this case, there were none, by the admission of Mr. Waxberg and his own statement that there was never an agreement as to price. Never was. That he, they at the time that the commitment was issued the only thing that they had according to Mr. Waxberg was just rough drawings.

Now, your Honor, by the same token, in the first cause of action the plaintiff seeks to recover as damages fifty thousand dollars. There has been no testimony concerning how that amount of money was to, or could be established. If there were a contract here, the recovery would be limited to the profit to Mr. Waxberg, that is the difference in the cost of constructing a building and the amount of money which had been agreed upon [148] to be paid. Primarily there is no testimony as to any amount of money having been agreed upon as a price and there is a total want of testimony or specific testimony touching on the point of how much it would have cost Mr. Waxberg to build the building. In response to a question by Mr. Hepp he said it would be impossible for me to know whether there is ten thousand or fifty thousand or a hundred thousand dollars of profit. The fact of the matter is that by his testimony it was impossible for Mr. Waxberg at any stage of these proceedings to have ever reached an estimate of what he would build the

building for. There was, he could not even have agreed or his testimony is that he would not have agreed under any circumstances upon a price to build the thing for until such time as there is testimony here introduced as to what he agreed to build it for and what it would have cost him to build it, recovery in this thing as a matter of damages is limited to that specific amount and there has been no testimony in that regard, so as to the first cause of action I submit to you that there is testimony that there was no contract.

And secondly, that there has been no proof of damages.

Now, as to the second and third causes of action, those, your Honor, are based upon the theory of quantum meruit and I believe if we interpret the legal theory of quantum meruit in a light most favorable to this plaintiff or to this, yes, to this plaintiff that we would consider the legal theory or the legal concept of quantum meruit as an implied contract under which a [149] person seeking recovery could or would expect payment for services or remuneration for money expended. I think that this, so far as this case is concerned, that is interpreting the theory of quantum meruit or implied contract in the light most favorable to the plaintiff, that is, that the conduct was such that he could have expected to be paid.

Now, in that regard the following questions were put to Mr. Waxberg under cross examination. Question, "In this instance you were supposed to recover your costs for these trips to Seattle and the time

that you spent with Chiarelli and Kirk and the like from the profit from your builder's profit on this thing, were you not?". Answer, "Well, yes. I expected to when the building was done why I would be." Question, "That is where you were to be repaid for any moneys that you expended?". Answer, "That's right". "Any time that you lost, normally you expended time and money preparing to build these things, for instance like the Nenana School, don't you?". Answer, "That's right". Question, "And it is a part of normal, natural business expense?". Answer, "That's right". Question, "And you were paid for that in whatever profit you make on the job?". Answer, "That's right". Question, "And that is what was anticipated in this case, you and Rudy were going in together, build this building, you were going to build the building and any expenditures and the same as Rudy spent his time on the thing to you by way of profits in the buildings of the building, to him by ownership in the building?". [150] Answer, "Well, this is a little different situation. Had Ruby come with plans and specifications this building as it is now, how much will you build this building for, and I gave him a figure then I am out, but I helped to promote this deal." Question, "I know you did, and it is all together different from normal contracting operations?". Answer, "Yes". Question, "But how were you to have been repaid if it wasn't from the building?" Answer, "Well, that is how I was to be repaid, through the building". Question, "Through the contract, through the building, the construction of it".

Answer, "That's right". Question, "And you were supposed to get to build this building after the final specifications came out, that is why you were working down there with Chiarelli and Kirk so that you could have the building designed at a lower figure so that you could have some profit guaranteed?" Answer, "That's right".

Question, "And at the time that you made your profit on the building you would then be repaid for all the moneys you expended just the same as labor that went into the building?". Answer, "Right". Question, "And there wasn't any agreement on Rudy's part to pay you for those expenses other than as it came back to you out of the building?". Answer, "No, there was no agreement that I was going to be kicked out of there either after the commitment was made." Question, "But that is the way you were supposed to get this money back, wasn't it?". Answer, "Well, yeah". Question, "From the building?". Answer, "That's right". [151]

Now, your Honor, that negatives entirely any inference or any presumption or any assumption whatever on the part of Mr. Waxberg that he expected or anticipated repayment of any of the moneys that he expended in relation to securing this job, in relation to helping put the thing through. He was down there anticipating and perhaps undoubtedly assisting in the preliminary work on a building thinking that with the inside track and hoping that he would be able to construct it and assisting in getting the building costs down to a

place where he could make a profit on it and if in fact the building had been constructed and if in the planning of the building he had been able to secure a commitment and had built the building at a substantial reduction then he would have received an excellent profit.

Obviously from the answers that he gave to these questions he did not anticipate being repaid. He didn't say that he had ever made any demand on Rudy Hill or Mrs. Hill to pay him anything in advance, didn't say that he had ever at any time made demand on them. Never had requested them to pay him any money in advances or otherwise. In fact his testimony is quite the contrary to that theory, that what he did here is precisely what he did in bidding on the Nenana School job, which he testified that he now has. Under this theory a man would or under the theory of the plaintiff as he wants to advance it here, any time that a contractor desired to build a building, went to a person who is considering constructing a building and made suggestions or talked to anybody [152] at all, or made any trips to the city he then would anticipate recovery from the man with whom he had talked or who anticipated constructing a building unless he got the building. And here he said he expected to be repaid for his services from the profit of the building, just the same as the labor on the building would be repaid. That doesn't sound in an implied contract or in quantum meruit. Quantum meruit requires that there must be in the mind of the person seeking to recover a reasonable grounds to an-

ticipate that the services that he has, or is then performing will be paid for.

Your Honor, I submit to you that everything that was done in this instance was preliminary to the creation of a contract, preliminary to an agreement to build a building. And the testimony is completely in accord with that theory. There never was a contract. The building was not constructed. There should be no recovery.

Mr. McNealy: If it please the Court, counsel with one breath seems to argue the point that there was no contract, no contract established but the, in the next breath argues the point that anything that the plaintiff here is to recovery why he was to recover out of the contract for building the building. It seems to me his statements are highly inconsistent. Either there is a fallacy in his, in counsel's statement there that he is to recover these expenditures from the contract to build the building or there was no, either was a contract or wasn't a contract and [153] counsel cannot argue the matter both ways in one breath, say there was, imply there was and another one that there wasn't.

If there was no contract then there was no possibility of, under counsel's theory, of him recovering anything from the builder's profit. He would have had to look elsewhere for his remuneration. Now, speaking frankly with the Court, I am far from well satisfied with the testimony in regard to the first cause of action. However, I am not throwing in the sponge so to speak on that first cause of action. At the moment I don't believe that any con-

tract, while there is an amount set in here and while the plaintiff was indefinite as to when this figure was arrived at, I think that a contract of this kind, in fact many contracts which no price at all is mentioned. I think it was established by the plaintiff here that there was an agreement between he and Hills to construct the building. I think he fell down on testimony as to what amounted to the construction. The contract whereby he would, the agreement there where he would furnish the materials and do a job, I don't think according to whatever plans and specifications they had would be sufficient, whether any price so long as he stayed within the price range of the FHA which seemed to be the nut and kernel of this whole action. This contract with no price involved, in fact common with regard to lumber companies and that where parties agree to take a certain amount of lumber and materials. And they take the lumber and materials, why they are liable to pay for them [154] regardless of whether there has been a price agreed upon or not and I think the same thing applies here. I think, trying to lead to, I think there was an agreement there, meeting of the minds at one time there early in this proceeding whereby Waxberg was to construct the building and the materials and other conditions were to go over until the plans and specifications came out, until they saw what they got out of the FHA. Waxberg was kicked out of the deal, using the language stated, prior to the time that these final plans and specifications came through. Now, he testified there that he was to, that the FHA would go along with

six percent for the contractor. Actually, he would get out of it whatever he could make in the way of profit, but he would have to invest and build this building within whatever they did get from the FHA.

I think there is, as the, the way the case stands now, I think it is even sufficient as in regards to the first cause of action to allow the matter to go to the jury, if there were no further testimony on either side for the jury to determine the facts. Naturally, I don't agree with learned counsel's theory on the matter of quantum meruit. I think that the Court knows, realizes that we have pleaded here within the Federal Rules on alternative cause of action here. I think if they are considering all the facts in the case, if there was no contract, or even if there is nothing more than a contract to make a contract and that by plaintiff's efforts and endeavors, by when we stand [155] uncontroverted at the present moment that he assisted Mr. Hill in the eventual realization of the Polaris Building.

Now, it is true the testimony here is that the Polaris Building is a different building than was constructed otherwise. If the Court please, the whole of this case ties in around the Federal Housing authority's program 608. As I remember from plaintiff's testimony he said that they had to meet a deadline on this 608 project. If that deadline hadn't been met then the present Polaris Building couldn't even have been built. He had done all of this preliminary work there up to and including the securing of this commitment under project 608,

which project, your Honor, so far as Alaska was concerned, went out of effect to the best of my recollection about the 25th of February, 1950. It would have been impossible or there were no further 608 commitments issued in the Territory except for revised commitments after that date. And certainly his services that he has performed with the contract for making a contract have been of value to the defendants here. If and in addition to the quantum meruit theory it certainly would be a matter of unjust enrichment if these defendants here can use the skill and the time and the expenditures of plaintiff if he accomplished nothing else than to secure for them the matter of the FHA commitment.

The fact was that he was an indispensable party in this action in dealing between Hill and between the architect, Chiarelli, and by reason of the termination date of this 608 where they had to have this in by the 24th, 25th of February. His services, I believe, were definitely indispensable and if for no other reason, your Honor, than that which I have stated, the plaintiff certainly as to his second and third cause of action is entitled to have the matter of the facts involved, to have it submitted to the jury for decision.

The Court: I might state at the offset that the Court feels inclined to direct a verdict for the defendants so far as the first cause of action is concerned and by way of comment I wish to state that Mr. Waxberg on the stand impressed me as being

honest and forthright when it came to important matters pertaining to this cause of action he couldn't remember because it was so long ago and I am commenting on that for a reason. Mr. Waxberg shouldn't suffer, no litigant should suffer because of congestion in Courts, but I am sure that his memory would have been better had this case been seasonably reached for trial. It is regrettable, having been filed in November 1951, that Mr. Waxberg comes to Court in August 1955 to seek his remedy. But, as you know, I can't guess and speculate and permit the jury to guess and speculate because of the lack of memory and the failure to know facts that are necessary to be known and shown to the Court and jury.

I have, of course, read and studied the complaint, second amended complaint and as I read it, it specifically sets forth that on a certain date the plaintiff and defendants entered into [157] an oral contract on the 16th day of January, 1950, whereby the plaintiff agreed to construct the building for the defendant and that on or about the 2nd day of February, 1950, plaintiff in accord with said oral contract agreed to construct said building for defendants at a total cost of one million six hundred ninety-four thousand, three hundred seventy-four dollars, which offer was accepted by the defendants. And plaintiff was instructed to proceed and so forth. Now, I can't find anything in the evidence that would bear out that type of a contract. The plaintiff has testified he doesn't know where the figure came from. There is no testimony that the defend-

ants did agree to pay him that particular amount to construct any kind of a building. He admits that he didn't know what the building would cost. He didn't see plans and specifications and I don't see how I could permit the jury to speculate on that. If the contract were proved by the plaintiff we, of course, would still have the problem of damages and there has been no testimony here, if there had been a contract for the specific amount, how much it would have cost to fulfill the contract. There is no way of measuring Mr. Waxberg's damages. As a matter of fact, he might not have been damaged at all. There may have been no profit in the construction of the building, had he received the contract.

I think that Mr. Waxberg was perhaps very improvident in his dealings. He dealt perhaps in good faith but not using very good business judgment. I don't know what he expected out [158] of this thing. It would seem that he was going to help the Hills procure an FHA loan and if they obtained the commitment then the Hills were to hire Mr. Waxberg to build a building of some sort and as he says, no agreement on the part of the Hills to reimburse him for money, time expended in procuring the loan. This cause of action is predicated on the express contract to build and when the evidence is in Court at most it seems is perhaps there was an agreement on the part of the defendant that maybe they, or that they would employ Mr. Waxberg to build some kind of a building for them if they got the commitment which is entirely differ-

ent than the complaint sets the cause of action forth.

Getting now to the second cause of action and the third cause of action, still the Court is troubled. According to the testimony of the plaintiff the most he expected as he said was that he would have recouped the amount of money that he expended from the profits of building the building and there is nothing before this Court, not a scintilla of evidence to show that there would have been any profit out of which he might have recouped. I don't think it would be proper for me to say, well, surely if he had a contract of over a million dollars he certainly would have made money; because the contract involves a lot of money doesn't necessarily involve a lot of profit. Do I have a right to speculate and say, well, if he had gotten this big contract there would have been a profit there whereby he could have recouped the amount he advanced? I don't know why he advanced the sums he [159] did. I can't figure it out from the evidence. I wish that I could figure out some way under the law whereby he might be reimbursed for the amounts that he advanced but if I had that power to order that amount paid, it might be an injustice because there is nothing in the evidence upon which I could base such an order.

So it is not a pleasant thing for me to do, but at this time I am going to grant the defendant's motion for a directed verdict so far as the first cause of action is concerned and if the plaintiff will elect as to whether they, whether he wishes to go along on the second or third cause of action I may

deny the alternate motion at this time. Does the plaintiff wish to elect as to whether he will proceed with the trial on the second or third cause of action?

Mr. Hepp: I don't quite understand the Court.

The Court: I will give you an opportunity to elect which cause of action, the second or third cause you wish to proceed under. If you wish a ten minute recess to discuss it, I will be pleased to grant it.

Mr. Hepp: Could counsel take a five minute recess?

Clerk of Court: Court is recessed for five minutes.

(Thereupon, at 3:20 p.m., the Court took a recess until 3:30 p.m., at which time it reconvened and the trial of this cause was resumed.)

Clerk of Court: Court is reconvened.

(The following proceedings were had out of the presence and hearing of the jury):

Mr. McNealy: If it please the Court, the plaintiff at this time has elected to stand on the third cause of action of the complaint and elects that, your Honor.

The Court: And Mr. McNealy and Mr. Hepp, for the further enlightenment of the Court now, what is the exact theory of the third cause of action? In other words, are we relying on the existence of a contract and a breach thereof or is it some other theory?

Mr. Hepp: It is under an unjust enrichment theory, your Honor, for the reasonable value of these services as they may relate to the benefit

which the plaintiffs, which the defendants had. In other words, reasonable value of the services which I feel is sustainable under any theory even in an involuntary bailment when services are rendered for which there is a value to the recipient the Court will not stand by and allow it to go unrewarded. I don't understand Mr. McNabb's theory about what somebody expects or anything like that. In such instances where as in involuntary bailments where a person strenuously against his will is required to perform services in a bind, nobody has a thought of expectation. I am merely stating that it is no test at all. If these services of the plaintiff were valuable to the defendant and the law presumes nobody does anything for nothing or expects anything for nothing and a very strong showing is required to upset that presumption. We feel that under unjust enrichment and the reasonable value of the services as the inure to the benefit of the defendants is a valid cause of action and [161] there certainly is an ample showing at least to this point of those services being rendered and of the defendant receiving them which we feel obliges the defendant to pay for them.

The Court: It seems to the Court, Mr. Hepp, that there is certainly some testimony that the plaintiff performed certain services. Do you think you could point out where in the evidence shows that the services performed by the plaintiff were of value to the defendant?

Mr. Hepp: I certainly can, your Honor, if you take one instance of the, it is undisputed and un-

contradicted testimony, the drill soundings, the surveys and preliminary work are necessary for an FHA commitment. There is other uncontradicted testimony that the FHA commitment under this public law closed the latter part of February and this just slid in under the deadline, is no longer available and those things were indispensable parts of the defendant building any building at all.

The Court: And do you think, Mr. Hepp, that you can and will get some authorities for the Court and perhaps some requested instructions so that I may properly instruct the jury on the theory of unjust enrichment and reasonable value of services, provided, of course, the case does go to the jury. I don't mean to produce them at this moment, but you can submit to the Court requested instructions if any you have and any legal authorities that you may have on the theory of unjust enrichment and reasonable value of services as would be applicable to this case at bar. [162]

Mr. Hepp: I would be willing to do that provided, this has been the defendant's motion. I think that he should provide authorities to support his motion. He is the one that is moving the Court. I will be glad to respond to any authorities.

The Court: That is true. I anticipate a motion later on in the case also which may not take place.

Mr. Hepp: I would be glad to take up, to take the matter up then, your Honor.

The Court: Well, the Court would like to be fortified with authorities. Mr. McNabb, do you have anything further to add at this time?

Mr. McNabb: Your Honor, I wish at this time to renew our motion now specifically as to the third cause of action which the plaintiff has elected to proceed on and I wish once more to call to the attention of the Court the testimony of the plaintiff in, as regards where he anticipated and where he expected to receive his compensation and if there was no intention, your Honor, in the mind of this, of the plaintiff and the law is quite clear on that score. There is no doubt about the law in that regard, if these things were preliminary to a contract and these were negotiations in the expectation of receiving a contract to construct a building, and if the plaintiff did not anticipate payment and did not expect payment and made no demand for payment and didn't anticipate payment for the things that he did or the money that he expended except from the construction contract, it is and the Court may recall that I asked him on that score, did they discuss what would happen in the event that the commitment was not issued, and he said it was never even considered but his testimony is, but that is the way you were supposed to get your money back, wasn't it; and the answer, "Well, yeah, from the building, that's right."

The Court: But in this situation there was no agreement as to how he would be reimbursed if the commitment were not granted but the commitment was granted in this case and as I understand the plaintiff's theory and from the evidence that he claims there was an agreement that the Hills would have him build and if he built he would have re-

couped the expenses. That is the theory of the plaintiff.

Mr. McNabb: That's right, your Honor. I am in complete accord with that proposition. Certainly but there was no contract and the Court has already held that if that was a contract that is the thing that he should recover under, isn't it? A contract to build. That is why the, that is where the recovery comes. That is the allegation that he was supposed to build a building but there wasn't any contract and the Court has ruled in dismissing its first cause of action that there wasn't any contract.

The Court: The Court goes a step farther. I claim that it is highly speculative. We can't assume that if he had, had the contract been given to the plaintiff we can't assume that he would have made money. I don't believe that is a proper assumption. And there is no proof here that he would have made money [164] even though he had gotten the contract and that is what is troubling the Court on any theory.

Mr. McNabb: That is entirely correct, Judge, and there is the place that he has to recover if he, if recovery there is on a contract. It is all a basis. It does not—let me ask the Court a question. There has to be a meeting of the minds along the lines some place or there isn't any contract at all. Everything in the world was preliminary to a contract to build. Everything that was done was preliminary to a contract to build. The Court has now ruled that there never was a contract to construct a building, that it was pure speculation. Yet the plaintiff by

his own testimony has said every nickle that I put into this thing I put in anticipating to get my money back from the construction. In other words, in anticipation of the execution of a contract. He didn't anticipate, he didn't expect, he didn't intend to be paid for these things, Judge, except as a part of the contract to build and he could have lost a hundred thousand dollars or he could have made two hundred thousand. The whole works is based on that theory and now they want to come in here and say oh, no, that is not the way it was at all.

What quantum meruit amounts to is an alternative sort of a proposition, but they come in and allege a contract and Mr. Waxberg insists that the only place that he expected to recover any money at all was not from Rudy Hill but right out of the proceeds of that building contract. He didn't anticipate it. [165] He didn't expect it. Evidently he didn't want it because he didn't make any demand. He went ahead voluntarily. If you will recall his testimony in reference to Mr. Orsini he said for work that he did for me.

The Court: The Court at this time will deny defendants' motion as to the third cause of action of plaintiff's amended complaint.

Mr. McNabb: Well, your Honor, there is more now. I haven't finished.

The Court: And the Court will be pleased to have any authorities that counsel may wish to produce.

Mr. McNabb: I would like to point out to the Court in repleading paragraph two of their first, of

their second cause of action. Now then in the third cause of action they replead paragraph one of the first cause of action. In paragraph two of the third cause of action they replead paragraph two of the second cause of action which alleges that on the 16th day of January the plaintiff and defendant entered an oral agreement with plaintiff whereby plaintiff was engaged to build and construct a building to be known as Second and Lacey for an agreed sum of a million six hundred ninety-four thousand three hundred seventy-four dollars, and the Court has already ruled that that is not true.

Also, a little farther, that they spent fourteen days at work on the thing. There is no proof to that, on that score. [166] Total want of evidence in that regard. The testimony as regards L. Orsini is that he did work for me. There is no testimony whatever that Mr. McNealy was employed for Mr. Hill, no testimony that he was ever in fact employed. Actually in paragraph two, which they replead, it is based entirely on an agreement to construct a building. I am sorry if I take the Court's time but there are some of these things I feel the Court should consider at this time upon which there has been no proof.

There is no, I don't know what these exhibits show as far as taxicabs and telephone charges. I don't know what the proof is as regards meals. I don't think there is any proof in reference to a hundred twenty-eight dollars for meals.

The Court: Mr. McNabb, the fact that each and

every alleged element has not been proven would be no reason to grant your motion.

Mr. McNabb: Oh, that is entirely correct, but those things should never be allowed to go to a jury, your Honor, and this is, at this time they should be stricken for want of proof.

The Court: Well, of course, the Court will only submit to the jury, if the case is submitted to the jury, the items that are proved.

Mr. McNabb: Yes, but I want to get this record in here now. I don't want to slip any place along the line.

Mr. Hepp: May it please the Court, I don't understand what we are doing now. I understood the Court has ruled on all the motions before it. Is Mr. McNabb making another motion? [167]

The Court: It seems Mr. McNabb wishes to make further argument on his motion. Is that right, Mr. McNabb?

Mr. McNabb: That is correct, Judge.

The Court: Have you concluded?

Mr. McNabb: That is all I guess at the moment.

The Court: Gentlemen, it is nearly four o'clock.

The Court has a matter fixed for four o'clock, criminal matter. It will be a good opportunity, I will discharge the jury until ten o'clock tomorrow morning and so as not to have any uncertainty existing, the Court has denied the defendants' motion to dismiss plaintiff's third cause of action and while I am not going to ask the jury to return until ten o'clock tomorrow morning, I will continue this case until 9:30 at which time I will be pleased to have counsel

for the respective parties submit any authorities that you might have for the Court and it is possible that I may reconsider the motion to dismiss at that time. I would like the authorities you may have to present and I will see what I can find myself and will you, please, call the jury.

(Thereupon, the jury entered the courtroom and the following proceedings were had in the presence and hearing of the jury):

The Court: The parties wish to stipulate that the twelve persons in the jury box are the jurors duly impaneled and sworn to try this cause?

Mr. McNealy: Yes, your Honor. [168]

Mr. McNabb: Yes, your Honor.

The Court: Members of the jury, I ask that you heed the admonition I previously gave to you not to discuss this matter with anyone nor among yourselves; and not to express any opinion until the case is finally submitted to you, and you are excused until ten o'clock tomorrow morning. At this time the Court is going to take up some criminal matters.

And this case will be continued until 9:30 tomorrow morning.

(Thereupon, at 4:00 p.m., the trial of this cause was adjourned until 9:30 a.m., August 3, 1955.)

Be It Remembered, that the trial of this cause was resumed at 9:30 a.m., August 3, 1955, plaintiff and defendant both represented by counsel, the

Honorable Vernon D. Forbes, District Judge, presiding:

(The following proceedings were had out of the presence and hearing of the jury):

Clerk of Court: Court is now in session.

The Court: The Court at this time will take up any matters to be considered in civil cause 6481, Waxberg vs. Hill, et al.

Mr. McNabb: May it please the Court——

The Court: Mr. McNabb.

Mr. McNabb: The Court will recall that yesterday I [169] directed a motion to the Court for a directed verdict as regards the third cause of action stated in the plaintiff's complaint, which they elected to proceed on. The theory apparently of the third cause of action as it is stated is that the plaintiff is entitled to recover on the basis of quantum meruit. Quantum meruit, of course, is a legal doctrine which is based on an implied contract. The theory of quantum meruit being that a man who performs services for another expecting at the time that the services are performed that he will be paid for them and in the absence of a question, of a request that the services be performed that they are in fact performed under such circumstances as would lead the party for whom the services are being performed to believe that he would in fact pay for them. That is, there must, there is under that theory, under the doctrine of quantum meruit or under the implied contract there must be some showing that there was an intention to perform the services for money and a receipt of the services un-

der such circumstances and under such conditions as to negative the proposition that the services were being performed gratuitously. It is an equitable doctrine and quite a proper one. There is no question but that if a man sits idly by and allows services which are of value to him to be performed under such circumstances as there is reason to believe that the party performing the services will be paid then and in that event the law implies a contract. It requires payment.

Now, in this case I want to call particularly to the [170] attention of the Court the third cause of action is based upon an oral agreement. That in itself is sufficient to negative the quantum meruit theory because the oral agreement is an agreement to build a building. Now the Court, this Court, no Court in the world under the law can write a contract for people. There must be an absence of any contract at all and the Court implies a promise to pay for the receipt of services. The case *In Re McCarthy Portable Elevator Company*, 196 Federal at 247, the Court holds that the mere rendition of services does not necessarily carry the right to compensation where not performed on request of the person sought to be charged therewith, the circumstances of its rendition must be such that in law it will be presumed to have been rendered for the benefit of such person and not the party rendering it.

Now, the circumstances in this case are such that there was a contingent, a contingent recovery, a contingent profit of some considerable amount to

be had by this plaintiff in the event that this building were in fact constructed and the Court will recall his testimony which I have been over time and again. The single fact that one receives benefit from services, work or labor or incidental materials is not sufficient of itself to create a legal obligation to pay there for. That is the case of *Miller against Fisher*, 77 *Southeastern*, 151.

In 71 *Corpus Juris* at Page 54, which is under the title of work and labor, paragraph or Section 19, there is this [171] statement to be found. No recovery can be had for preliminary services performed with a view to obtaining business through a hoped for contract or order. Now, in that regard, your Honor, it is unfortunate that the cases which are cited in support of that proposition are very nearly unanimously reported in *New York Supplement*, which we have not, but if the Court will examine that citation, 71 *Corpus Juris* at Page 54, the Court will find there a substantial number of cases supporting that proposition. That is, that no recovery can be had for preliminary services performed with a view to obtaining business with a hoped for contract or order. We submit to the Court at this time that that is precisely what occurred in this instance.

Where services are as much for the interest of the party performing them as for the party for whom performed and the former has no expectation of charging there for at the time, a claim subsequently asserted for compensation therefor will be disallowed as a mere afterthought. That is *Equit-*

able Life Assurance Company of Iowa against Crosley, 265 Northwest at 137.

We submit again that that is precisely what was in mind here. There was no intention, no expectation at the time that the services which were rendered in this case were in fact rendered. There was no expectation at that time to charge for them. In fact the evidence is quite to the contrary. A promise to reimburse will not be implied for services performed for the mutual benefit of all of the parties concerned. Of course defined in [172] this instance that the defendants here are obligated to pay the plaintiff anything this Court must find that there was an implied contract, an implied promise to pay. That is contradictory entirely to the evidence and certainly, your Honor, the things that were done in this case, the services that were performed were done for the mutual benefit of the parties, that is Mr. Waxberg when he performed those services expected to realize a profit from the construction of a building. That is Williams against Adams, 195 New York Supplement at Page 86. Pardon me. Where services are voluntarily rendered by one person to another with no expectation at the time the services are rendered to charge therefor and the evidence is that there was no intention there is no showing or no proof in this cause so far that there was any expectation or intention to charge at the time that the services were rendered, such services cannot afterwards be used as a basis of an implied promise to pay. That is Serg against Walters, 122 Northeastern 2nd at Page 625.

For a party to recover the reasonable value of services rendered to and knowingly and voluntarily accepted by another the circumstances must be such that is to warrant the inference that the services were rendered and received with a mutual understanding that they were to be paid for since quantum meruit rests upon an implied contract. Mutual understanding. There was no such understanding, your Honor. *Twiford against Waterfield*, 83 South-eastern 2nd at 548. Where one person renders valuable [173] services to another which the latter accepts, the law will ordinarily imply a promise to pay the reasonable value thereof though evidence must disclose that the one who rendered the services did so under circumstances warranting a proper inference that he expected receipt of, that he expected the recipient of the services to pay for them. And that the recipient in accepting the benefit was or should have been aware that the services were being performed with that expectation.

Now, again, your Honor, I will call to the Court's attention that there was no expectation of being paid for them or to charge for them at the time that they were rendered and certainly there was no expectation of paying for the services. *Cole against Howard Corporation*, 219 Southeastern 2nd at 856. Where services are rendered under circumstances which do not support an inference of an expectation of payment the party for whom the requested services are performed or who accepts services is not under an implied obligation to pay there for. And certainly here the testimony does

not support any inference to pay. Cleaves against Sharp and Don, 171 Atlantic 374. Mere benefit from or the use of the plans of an architect did not warrant the recovery for services without proof that the defendant personally obligated himself to pay. That is Green against Message, 258 New York Supplement 28. No contract to pay for services rendered voluntarily without expectation of compensation is implied. Hammond against Consolidated Rendering Company, [174] 135 Atlantic 197. Am I taking all of the Court's time?

The Court: Perhaps, Mr. McNabb, you can sum up in a moment.

Mr. McNabb: Well, your Honor, I think probably the best case that I found and I have several others here, the case I believe which more closely approaches the fact situation in this case is Brightwell against Oglethorpe Telephone Company, 171 Southeastern at 162, which held that the plaintiff cannot recover for services rendered or money expended without request for the company which he thought he had bought under an oral contract since he actually or presumably knew that the agreement was unenforceable. Now, that is about as close as we can get to the case at bar. Mr. Waxberg's testimony is that there never was an agreement as to price, yet he did in fact spend money anticipating that he would recover that money plus profit from the construction of a building. There is no showing that there was a contract to employ Mr. Waxberg, and the Court further ruled in that case that generally services performed or money paid under a

mere mistake of law cannot be recovered. No liability arises from services rendered or acts done on request where the circumstances show that compensation was not intended. Carlson against Trench, 214 Northwestern, 928, and incidentally, there is a note on the subject at 54 ALR at page 550.

I wish only to state this to recover on their third cause of action this Court must hold, this Court must in fact create or form a contract for these parties based on an implied [175] agreement. Now, your Honor, we feel that that is not the situation here. There cannot be an implied agreement and we feel that this Court cannot hold that there was an implied agreement when the services were performed on the basis of a contract or negotiations for a contract which was not enforceable. To hold here that there is right to recover in quantum meruit would be to hold that there was in fact no negotiations for a contract and that in fact Mr. Waxberg did not perform the services or spend the money that he did in anticipation of a contract to construct a building and the proof is that he did in fact perform the services anticipating that the money would be recovered by him from the proceeds of that contract.

Mr. McNealy: If it please the Court, I think I can be very brief here. If the trial should continue I worked late last night on this case and some this morning here. First I, at this time can cite only two cases to the Court, 89 Pacific 86. The Court states in that in an action to recover the reasonable value of services performed that a contract claimed

to have been entered into between the parties was so indefinite that it could not be made the basis of recovery is immaterial. Where evidence as to the contract was introduced to show the nature of plaintiff's employment and together with proof of this breach was to be used as a basis for recovery for reasonable value.

51 Atlantic 652, contract for services failed by reason of the mutual misunderstanding as to the material, terms of [176] payment. A person who is, who has partially performed a contract as he understands it may recover reasonable compensation for his services. Counsel appears to forget and to believe that his clients here should profit by their wrong. That is in bringing out all the points here he failed to bring out that the defendant set in motion or actually performed the act which prevented the plaintiff from completing the contract or even entering into a contract and in that connection, your Honor, based upon Rule, Section B of Rule 15 of which I am not going to read to the Court. I know your Honor is familiar with the rule and in the annotations, of course, are cases set up where during trial or even after judgment an amended complaint may be filed, cases in the annotation 76 Federal Supplement 233, that amendment of the pleadings should be allowed *were* the factual situation has not changed though a different theory of recovery is presented. I have prepared, your Honor, and am going, under Rule 15, Section B, declare a third amended complaint which conforms strictly to the proof and the evidence as sub-

mitted here and I am going to ask leave of the Court at this time for permission to file this complaint, which does conform to the proof since there was no objection to the testimony of the plaintiff as he gave it here, that his testimony in any way controverted his original pleadings.

I believe that we should be allowed to file it, also realizing that the matter is within the discretion of the Court.

The Court: Will counsel please submit the original of [177] the third proposed amended complaint with a copy thereof on the counsel desk, defendant's counsel?

Mr. McNealy: Your Honor, I have two additions to add to this. I haven't had the opportunity this morning or the time to examine the Clerk's exhibits.

The Court: How long will it take you, Mr. McNealy?

Mr. McNealy: Not more than a minute or two.

The Court: Very well, you may do so. The Court at this time will give the defendant, the attorney for the defendant an opportunity to be heard on the plaintiff's motion for permission to file a third amended complaint, copy of which was handed to the defendant's attorney.

Mr. McNabb: May it please the Court, yesterday if I recall correctly the Court dismissed the plaintiff's first cause of action and required the plaintiff to elect between the second and third alternative causes of action. After the election to proceed on the third cause of action, the defense renewed its motion to, for a directed verdict and pointed out

at that time that a recovery under the third cause of action was contingent upon a recovery on the first cause of action because it alleged a contract.

Now, your Honor, I submit to you that at that time, as of now the plaintiff had rested its case, his case. At that time it was incumbent upon the plaintiff to have proven a prima facie case, or in the event of failure of the plaintiff to prove a [178] prima facie case we feel that the law is that the defendant is entitled to a directed verdict.

Now, it appears to the defense that this is a fourth cause of action. I submit to you that without objection and prior to the time that the plaintiff rested they could then have moved this Court for an order amending the pleadings to conform to the proof, but we feel now that their motion to amend or to submit a fourth cause of action is untimely and that no provision for it is allowed under the law. They chose to stand and this cause went to trial on the issues which were raised by the plaintiff's complaint. We have had no opportunity to cross examine on any of these things. I don't know what the status of the case would be in the event that the Court allows the filing of an amended complaint. I take it then that we would have to commence again, that the previous trial or the evidence and the proof that is in at this time would stand for naught yet the law requires and the rules require that the plaintiff must in his complaint set out every claim that he has against the defendant.

It would appear to me that to allow the filing of an amended complaint at this time or if that were

the law that there would never be any end to litigation, that by the same token if a man comes before the Court, thinks that he proves one case through evidence which is not based upon the complaint, and I submit to you, your Honor, that though we may have objected, could have perhaps objected to various testimony of the plaintiff [179] we did not do that for the reason that the proof and the testimony at that time we felt had no bearing on the issues, that they didn't tend to prove the allegations of any one of the three causes of action which were set up in plaintiff's complaint. Now apparently what they seek to do is to establish by previous testimony the relevancy of a brand new complaint now after having testified they want to come before this Court and file a new complaint, start all over again. This it seems to me is an admission on the part of the plaintiff that our motion to dismiss the third cause of action has merit. Where is litigation to end? We did not come here prepared to defend on an amended complaint and any testimony that no harm or no prejudice would result to the defendant in this case or either of them, if we allowed all sorts of testimony to go in which were not relevant or material to the issues which were involved in plaintiff's original complaint, or plaintiff's second amended complaint, the allowance of this complaint, Judge, is highly prejudicial because apparently they feel that this is what they have proved.

Now if they had moved prior to the time that we addressed our motion to the Court for a directed

verdict, if they had then moved or had submitted a written complaint amending the complaint to conform to the proof as they had put it on, there would have been we feel some authority under the law for the Court to have allowed it, but that must be timely done prior to the time that we moved to dismiss or for a directed verdict. [180]

Judge, a plaintiff we feel in any lawsuit must prevail or must fall on the issues as they are drawn prior to the trial. This plaintiff cannot prevail on his complaint, first, second or third cause. The actions which are started in a man's complaint are those things which a defendant comes before the Court ready to defend against. We feel that there is no place under the law, I sympathize with this plaintiff but moral issues are not involved. This is not an ecclesiastical court, a Court of equity, yes, but moral considerations are not involved here. We feel that the law does not allow this, that there is no provision under the law and each of us feels sympathetic on many occasions toward litigants and toward all nature of people in society, but as practicing attorneys if we were to judge matters according to our own moral concepts and did not rely on the law as we know it or believe it to be then many of us who practice law would be required if we were to judge the right or wrong of man or his conduct, we would be required to say to a large percentage of our clients, I am sorry, I cannot represent you because I think what you have done is wrong. But as in criminal matters, lawyers and Courts can only rule not according to their own conscience, not ac-

according to the Christian doctrines with which they have become inculcated or indoctrinated, but what is the law. We don't make it. We interpret it. And that is the way law suits are run.

We feel that there is no right under the law for the allowance of the filing of this amended complaint.

The Court: The Court believes it has the absolute right under this kind of a situation to do a number of things, among them to grant a dismissal of the third cause of action without prejudice which under these circumstances would seem ridiculous and result in additional time and expense for the litigants and the Court, and the evidence of the plaintiff has been taken before the jury without valid objections on the part of the defendant and I feel that justice requires that I at this time grant leave to the plaintiff to re-open its case for the purpose of amending the complaint to conform to the proof and that motion is granted.

I feel that the proposed third amended complaint is in conformance substantially with the proof of the plaintiff in this case and I cannot see that the defendants would be prejudiced by allowing that complaint to be filed and I so order.

Take a five minute recess.

Clerk of Court: Court is recessed for five minutes.

(Thereupon, at 10:20 a.m., the Court took a recess until 10:30 a.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Mr. McNabb, do you have an additional copy of the third amended complaint?

Mr. McNabb: I have only one copy.

The Court: You have a copy. Mr. McNealy, do you have an additional copy? [182]

Mr. McNealy: I do have. It is not, your Honor—I can spare this copy.

The Court: Will the bailiff, please, ask the jurors to come in.

Mr. McNabb: Your Honor, I requested that they not call them.

The Court: Very well, the Court will hear from you, Mr. McNabb.

Mr. McNabb: First, your Honor, I would like to request the Court to continue this matter now so that I may have an opportunity to study this complaint and to prepare an answer or otherwise plead in reference to it. This is a new one now, this is not the third cause of action. It raises issues which were not involved in any of the three causes of action which were stated in plaintiff's complaint. I made a rather hasty perusal of the, certainly have had no opportunity to study it or to give it any consideration and as the Court well knows, I have not been able to research the problem but my first thought is in reference to the, it seeks to recover under the prayer in quantum meruit for the breach of an oral contract again to build a building; that there was a contract to build; that it was breached and violated and by reason of the breach of an oral agreement to build a building. They now seek to recover in quantum meruit for the things that were done. Now that is a new problem and I have not had an opportunity to study that. [183]

It may be that this thing, even under the theory of quantum meruit should be dismissed. Until such time as I have had an opportunity to consider it and to research the problem—(Interrupted)

The Court: Have you concluded?

Mr. McNabb: No, sir.

The Court: Proceed.

Mr. McNabb: I think it would be prejudicial to the rights of the parties defendant in this action to proceed now without an opportunity to research the question involved in this case and having an opportunity to see what the law is on the subject.

The Court: Mr. McNealy.

Mr. McNealy: If the Court please, we feel there is substantial authority for this. There have been no actual new issues raised. The difference is out of the testimony here which went in on the part, major part not objected to. I don't believe that the rights of the defendants have been prejudiced. The fact situation here is the only thing which the original agreement failed to prove was that there was an express and binding contract as to how much he was to receive and it failed thereby. The plaintiff's complaint failed by a mutual misunderstanding and the, in that connection where there has been a mutual misunderstanding why the Courts are quite unanimous, even back under the old common law method of pleading. I have read cases back to 1901 which hold that in that event there is certainly right to recover for reasonable compensation and especially where the defendant has [184] done anything to prevent the performance of a

contract if one could have been performed. I think the testimony was, that was presented here as I say without objections by the defense. I don't believe that their rights have been prejudiced and I don't believe that anything can be gained by a further continuance. Actually there are no new issues involved and as the early, possible may be considered here a different theory of recovery and if so, the number of cases holding in that line that the defendants are not in any manner prejudiced. They have all of their rights of defense and the witnesses who either admit or deny in any manner controvert the testimony which has been given and I feel they should be in a position to go ahead.

In other words, your Honor, I can't see that the rights of any parties would be prejudiced by continuance.

The Court: I feel that the action taken by the Court in permitting the amendment of the complaint to conform to the proof does not in any way prejudice the rights of the defendant. I can see nothing to be gained by granting a continuance of the trial and so, therefore, will deny defendant's motion to continue. Will you, please, send for the jury.

(Thereupon, the jury entered the courtroom.)

The Court: Will the Clerk, please, call the roll of the jury.

(Thereupon, the Clerk of Court proceeded to call the roll of the jury.) [185]

Clerk of Court: They are all present, your Honor.

The Court: Very well. You may proceed.

Mr. McNabb: Your Honor, I am at a bit of a loss as to know; you want to proceed with the defense of this case or does the plaintiff intend to call additional witness or witnesses?

Mr. Hepp: We will re-rest the plaintiff's case.

The Court: Very well. Now, Mr. McNabb, you understand the situation so far as procedure is concerned. The *defendant* rested. That is what you wished to know, I believe.

Mr. McNabb: Your Honor, we will put Mr. Hill on the stand now requesting, however, that when Mr. Sumter arrives here—here he is now.

GLENN ROY SUMTER

a witness called in behalf of the defendants, was duly sworn and testified as follows:

Direct Examination

Q. (By Mr. McNabb): Will you state your name, please? A. Glenn Roy Sumter.

Q. Where do you reside, Mr. Sumter?

A. Seattle, Washington.

Q. By whom are you employed, sir?

A. Washington Mortgage Company.

Q. What are your duties?

A. I am president of Washington Mortgage Company. [186]

Q. Are you familiar now or were you familiar in the year 1950 with the Federal Housing Administration Act and the regulations concerning Section 608 of that act? A. I am and I was.

(Testimony of Glenn Roy Sumter.)

Q. How did you become familiar with that act?

A. I spent ten years with the Federal Housing Administration. I was in the mortgage business before and after.

Q. When was that ten years that you were employed by the Federal Housing Administration?

A. Thirty-nine, '38 to '48.

Q. What were your duties?

A. Assistant Chief Underwriter.

Q. What did you do as Assistant Chief Underwriter?

A. I had charge of processing mortgage loans both multiple family and single.

Q. Did you have any experience or as a part of your official duties did you process loans for units of more than three apartments or more than four?

A. Yes, all multiple family.

Q. All multiple family. During that period do you have any recollection of the approximate number of projects, multiple unit projects that you processed or assisted in processing?

A. Oh, I would estimate a hundred, a hundred twenty-five projects.

Q. Were those projects in a particular area or were your duties confined, that is solely to a small area or to the entire [187] United States?

A. State of Washington.

Q. In the State of Washington. At what stage of the proceedings concerning a particular housing project did you first become acquainted with a particular project?

(Testimony of Glenn Roy Sumter.)

A. Would you restate that?

Q. Did you know or as a part of your official duties when did you first become acquainted or when did your first duties begin when an application was made for a loan?

A. Well, prior to the acceptance of the application.

Q. Prior to the acceptance. What was necessary to be done prior to the acceptance of an application so far as the FHA is concerned?

A. Well, you attempt to screen them so that you didn't go ahead or the sponsors didn't go ahead on a project that was not feasible, economically sound.

Q. Did you ever talk to any person or any group of people who were considering making an application and then after their discussion with you did not make an application?

A. Well, the procedure that was established at that time, we would always discuss a project before the acceptance of the application both with or as a rule with the architect and the builder and the sponsors.

Q. How then would you know, Mr. Sumter, that an application for a loan was proposed? [188]

A. Well, they would contact the office. I mean it wasn't a question of soliciting.

Q. Then it was customary was it, for you to discuss these matters even before you accepted an application? A. Always before.

Q. And after your termination or after you re-

(Testimony of Glenn Roy Sumter.)

signed from the service of the government under the FHA, what then did you do?

A. I set up the Washington Mortgage Company.

Q. And as such did you have anything to do or were your business relations continued in the matter of housing?

A. Yes, to quite an extent.

Q. What did you do in that regard, Mr. Sumter?

A. We acted as mortgage broker. Most of our business was originated through banks or lending institutions that had no particular staff for processing loans.

Q. What did that have to do with an FHA loan?

A. Well, there is considerable preparation or search prior to an application. A good deal of our work was involved in that phase of it.

Q. What has to be done or what normally did you do, let me ask you this, by whom were you employed in reference to FHA loans?

A. By the sponsors.

Q. And what did you do for them?

A. We would set up their application and handle the processing of the application through the lending institution and also through the FHA.

Q. Well, who is the lending institution or who may be the lending institution?

A. Any approved mortgagee, bank, insurance company.

Q. Mr. Sumter, who advances the money for the construction of an FHA project?

(Testimony of Glenn Roy Sumter.)

A. Well, it is entirely private financing.

Q. The government then does not finance these projects?

A. Oh, they have no interest so far as the FHA insurance is concerned.

Q. What does the government do in these matters?

A. They insure the lender against loss under certain conditions.

Q. Then a private institution may well put up the money. The government just insures the loan, is that correct?

A. Other than the Federal National Mortgage Association it is entirely private financing.

Q. Now then, after you established your own business how many FHA applications did you handle or have you handled?

A. I would say around a hundred projects.

Q. How many of those would you say are more than three unit, four unit projects?

A. Well, I refer to a project, it usually involves ten or more units.

Q. So then the hundred that you testified that you did in fact process all were more than ten units?

A. Yes. [190]

Q. Do you know R. P. Hill and Mary Hill?

A. Yes, I do.

Q. How long have you known them?

A. Since 1950.

Q. Where did you make their acquaintance?

A. They came to the office.

(Testimony of Glenn Roy Sumter.)

Q. Where is that office? A. Seattle.

Q. By that you mean your office?

A. Yes.

Q. For what purpose did they come there?

A. As I recall they were referred to our office from the National Bank of Commerce, Seattle.

Q. Did they make any inquiry of you?

A. At the time they first came to the office I was in the east and I believe it was about the third week of January, 1950, that I met them and at that time they were attempting to obtain a loan for the construction of an office building.

Q. Where was that building to be located?

A. Here in Fairbanks, Second and Lacey.

Q. Did you see any drawings or anything of the kind for such a building?

A. I don't recall seeing drawings. I believe there were some rough sketches or proposed.

Q. How large a building was that to be?

A. I don't recall the exact size, but it wasn't of any [191] great height.

Q. Would the, was that an apartment building or just a business building?

A. No, as I recall it was a commercial on the ground floor and offices a floor or two above.

Q. And for what purpose did they consult you?

A. At that time I believe they were interested in obtaining an RFC loan which we had had no experience with nor knew a great deal about.

Q. Do you know now about the approximate date of that first conversation?

(Testimony of Glenn Roy Sumter.)

A. Well, I, I am quite sure that it was after the 15th of January, perhaps the third week of January.

Q. Of what year? A. 1950.

Q. What did you tell them in regard to an RFC loan?

A. They had previously had discussions with my associates and they were then thinking of an apartment building rather than the original office building.

Q. Now, I know now but as regards this RFC loan for a business building, what did you tell them in that regard?

Mr. Hepp: I object to that. I think that he said they may have had a conversation with his associate. I don't think this witness is qualified under his testimony to state what was said in that regard unless they clear that point up. [192]

The Court: Well, he can state what he told them, not what his associates told him.

Mr. Sumter: I don't recall we had any discussions on the RFC loan.

Q. (By Mr. McNabb): You had a discussion then in reference to an FHA loan? A. Yes.

Q. When did that discussion take place?

A. I would say about, it was in the third week of January.

Q. And did they request you to perform any services for them in that regard?

A. As I recall they had already contacted an architectural firm and were obtaining preliminary

(Testimony of Glenn Roy Sumter.)

plans for an apartment building at the time I first talked with them.

Q. Did you ever see those plans?

A. Yes, I did.

Q. Would you recognize them if you saw them, Mr. Sumter?

A. The outline of the plan. Not the particular plan.

Q. This, Mr. Sumter, is the Defendant's Identification A. I ask you to examine that if you will, please, and tell us what it is if you know?

A. It appears to be the preliminary plans that we used for processing the loan application for Mr. Hill.

Q. Mr. Sumter, do you know what plans were submitted to the FHA authorities with the application? A. Well, this set right here. [193]

Q. Well, do you know?

A. Well, I know their basic requirements as to preliminary plans.

Q. Do you know whether the entirety of the plans, the preliminary plans that you have in your hand were submitted with the application?

A. It is quite evident that they weren't because I took the plans to Juneau.

Mr. Hepp: Now, I object to that answer and ask that it be stricken. What is evident and what he knows is two different things.

The Court: It will be stricken. Do you wish to have the question read.

(Thereupon, the reporter read the question.)

(Testimony of Glenn Roy Sumter.)

Mr. Sumter: They were not submitted with the application.

Q. (By Mr. McNabb): Do you know what plans were submitted with the application? Let me ask you this, do you know which of those drawings was not submitted with the application?

A. That is why I answered the question the way I did. Here is a sheet that bears a date of February the 14th, so it could hardly have been submitted with the plans I took to use.

Q. Are there any other pages there that were not submitted?

A. It appears that they are the basic requirements for preliminary submission. Other than the sheet. [194]

Q. There is one sheet there which is dated late in February in the middle of February that was not submitted? A. Of the original set.

Q. Mr. Sumter, what did you do for the purpose of securing an FHA loan?

A. I don't quite understand the question.

Q. Did you perform any services for the Hills?

A. We prepared the application, submitted it through the bank and handled the processing through the FHA.

Q. I will hand you Defendant's Identification B and ask you if you know what that is, please?

A. Yes, I know what it is.

Q. What is that?

A. It is the application for mortgage insurance which we prepared.

(Testimony of Glenn Roy Sumter.)

Q. What did you submit with the application?

A. In addition to the plans and specifications?

Q. Yes. A. The items listed here.

Q. Well, will you read those, please?

A. Legal description, letter re ownership, letter regarding zoning, photographs, city map, request for determination of prevailing wage, personal financial and credit statement.

Q. Now, who prepared those?

Juror: I can't hear the witness. Will he, please, speak up. [195]

The Court: You understand, Mr. Sumter, that the jurors cannot all hear you. Will you please speak up.

Mr. Sumter: Do you want this repeated.

Juror: I didn't get all that you were saying.

Mr. Sumter: Legal description, letter regarding ownership, letter regarding zoning, photographs, city map, request for determination of prevailing wage, personal financial and credit statement.

Q. (By Mr. McNabb): Now, Mr. Sumter, after Mr. and Mrs. Hill came to you with regard to the submission of an application, who did the work necessary to proceed with the preparation of an application?

A. We obtained the architectural exhibits from Chiarelli and Kirk. As I recall Mr. Hill supplied the photographs and the city maps and the zoning letters.

Q. Aside from the architect was there anything

(Testimony of Glenn Roy Sumter.)

to be done or which was done to your knowledge that you did not do?

A. Insofar is the processing of it?

Q. That's right.

A. I don't recall that even Mr. Hill had any connection with the actual processing of the loan. It is handled through the bank and through the FHA.

Q. Who did, who did the work, who did those things? A. Our office did those.

Q. Mr. Sumter, did you know Mr. Waxberg or do you now know Mr. Waxberg? [196]

A. Yes, I do.

Q. When did you make his acquaintance?

A. I don't recall the exact time but it was some time early part of 1950.

Q. Where did you make his acquaintance?

A. In our office in Seattle.

Q. Do you know why he came there?

A. He came with Mr. Hill and he was at that time I believe interested in the construction of the proposed building.

Q. At the time that you made application or prepared the application for mortgage insurance whose name appeared on the application as sponsors? A. Mr. Hill and Mr. Waxberg.

Q. Do you know why those persons were named as sponsors?

A. Mr. Hill was the owner of the land and the primary sponsor, or I would consider it. Mr. Waxberg was going to participate insofar as a percent-

(Testimony of Glenn Roy Sumter.)

age of his contractor's fee. An application you must show how the loan is to be closed. The mortgage does not represent the cost of the entire project and I believe we set it up showing that around forty-five thousand or so of the allowable contractor's fee would be waived as participating equity.

Q. Why was that done, Mr. Sumter?

A. Well, as I recall at that time Mr. Hill did not have the capital to finance the project in its entirety. [197]

Q. Is the participation by Mr. Waxberg in this proposed building evidenced by the application?

A. I believe it is.

Q. Now, under Schedule A there, would you explain that to the jury, please?

A. Schedule A you set forth the source of equity which is the difference between the mortgage and the total cost of the project.

Q. Let's go into that just a moment, Mr. Sumter. What, why is there a difference between the amount of the mortgage and the cost of the project?

A. The mortgage can only represent a certain percentage of the total cost as estimated by FHA.

Q. Who estimates the cost of the project?

A. In the application the estimate is made by the sponsors. The commitment is issued naturally on the basis of the FHA estimate.

Q. The FHA, how does it arrive at the amount of the commitment?

Mr. Hepp: Now, I object to that. There is no showing that this man, this witness was in the FHA

(Testimony of Glenn Roy Sumter.)

at that time and I believe the best evidence of how the FHA arrived at that figure would be the people that did arrive at that figure. I don't believe this man is basically qualified to answer that question although he may be generally versed in the way he ran the office at the time he was there. [198]

The Court: If he is asked the preliminary question, whether he knows and answers that in the affirmative I will permit counsel to inquire.

Q. (By Mr. McNabb): Do you know how FHA arrives at the amount of the commitment?

Mr. Hepp: I object to that unless he specifies what commitment he is talking about.

Mr. McNabb: Any commitment.

Mr. Hepp: I object, too general.

The Court: Yes, objection sustained.

Q. (By Mr. McNabb): Do you know how much the commitment was issued for in this case?

A. Well, I see a figure on the application one million, six hundred ninety-four thousand two hundred dollars which I presume is the amount of the original commitment.

Mr. Hepp: Just a moment.

Q. (By Mr. McNabb): Let me ask you this, did you see a copy of the commitment?

Mr. Hepp: I move to strike the answer as not being responsive. He said he presumes it.

The Court: It will be stricken.

Q. (By Mr. McNabb): You saw a copy of the commitment? [199]

A. Yes.

(Testimony of Glenn Roy Sumter.)

Q. Do you know how the FHA arrived at the amount for which the commitment was issued?

A. By a cost estimate.

Mr. Hepp: I didn't hear that answer, sir.

Mr. Sumter: A cost estimate prepared by them.

Q. (By Mr. McNabb): Mr. Sumter, is that figure, that is the commitment figure or do you know, let me ask you this, do you know what percentage of the cost of the project was represented by the figure of the commitment?

A. At that time a loan could not exceed ninety percent of their total estimate of the replacement cost so it would have been ninety percent or less.

Q. Or less? A. Yes.

Q. And the difference between the ninety percent and the cost of the construction is represented by what you referred to a few moments ago as the equity? A. Yes.

Q. Now then, is that, when must that equity be established?

A. At the time the loan is closed which is prior to the start of construction.

Q. Now, let me ask you, do you know why Mr. Waxberg is shown as participating to the extent of forty-five thousand dollars here in the application? [200]

A. Yes. As I previously stated at that time Mr. Hill did not have the resources to, other than land, to construct it, or finance the equity requirements and forty-five thousand of the contractor's allowable fee was to be used as equity capital.

(Testimony of Glenn Roy Sumter.)

Q. And do you know why Mr. Waxberg's name was placed on the application?

A. As I recall at that time he was interested in building the proposed building for them.

Q. In the applications that you processed while an employee of the government and the FHA and prior to this time in your own business, did you ever know of an occasion in which a builder was also a co-sponsor?

Mr. Hepp: I object to the question as too general, not within the issues of this cause, and for that reason prejudicial.

The Court: Sustained and while, Mr. McNabb, the Court is always very reluctant to interpose or ask questions I am going to ask Mr. Sumter a question at this time. Do you, Mr. Sumter, know the definition of the word sponsor as used under Title 608 of the Federal Housing Authority?

Mr. Sumter: Yes, sir.

The Court: What is that definition?

Mr. Sumter: Under the original act or rather under the original rules and regulations they require a corporate mortgagor rather than an individual. The corporation is never formed prior to an application so they developed the word sponsor as meaning [201] a person proposing a loan application which later will become a corporate entity.

The Court: Thank you. You may proceed.

Q. (By Mr. McNabb): Was it usual for a builder to be a sponsor as well?

(Testimony of Glenn Roy Sumter.)

A. My experience, ninety-five percent of our applications are builders.

Q. Is it customary for there to be more than one sponsor on an application representing divergent, perhaps divergent interest?

A. Yes, it is quite customary.

Q. How much interest does the application state that Mr. Waxberg would have or to what extent was he to participate in this building as a sponsor?

A. Dollar-wise?

Q. Yes.

A. It shows forty-five thousand.

Q. Now, Mr. Sumter, are there other costs involved in the construction of a building or the closing of an FHA other than the land itself?

A. There are many costs other than the land itself.

Q. And what are they?

A. Your primary cost, of course, the building. Then you have your architect's fee.

Q. How much, does the FHA allow a specific amount to go [202] toward the architect or to the payment of architects?

A. Yes.

Q. And how is that amount determined dollar-wise, percentage-wise?

A. Percentage-wise.

Q. Percentage of what, sir?

A. Percentage of their estimate of construction costs of the building.

Q. And what percent is that?

A. It will vary in localities from three to six.

(Testimony of Glenn Roy Sumter.)

Q. Do you know what they allowed in this case?

A. Five.

Q. Five percent of what amount?

A. Five percent of their estimate of construction costs which I don't remember the exact dollars.

Q. Mr. Sumter is the amount that the commitment is issued for, is that to be the construction cost?

A. No, it is ninety percent or less of their estimate of the total cost.

Q. But it is not based at all on construction costs?

A. Construction cost is only one part of their total estimate.

Q. How much was the architect's allowable fee in this case, if you know?

A. I don't recall. [203]

Q. At any rate, you know it would be five percent or you know they allowed five percent?

A. Yes.

Q. Of the construction cost, is that correct?

A. That's right.

Q. Do you know what the allowable construction cost was in this instance?

A. I don't remember.

Q. Would that figure appear on the commitment as it was issued?

A. No, it would appear on the project analysis which is issued in connection with the commitment.

Q. Do you have a copy of the project analysis?

A. I do not have it with me.

(Testimony of Glenn Roy Sumter.)

Q. You do not. Are there any other allowable fees and costs other than the architect's fee?

A. You have to keep in mind that this is a construction loan. In addition to the building you have an architect's fee; you have your interest during the course of construction; you have taxes during the course of construction; you have FHA fees which amount to one and three-tenths percent.

Q. Of what, sir.

A. Of the amount of the mortgage. You have your title and recording expense; you have your legal and organization expense; and you have your financing charge which is made by the lender, [204] all of which usually amount to seven or eight percent of the mortgage.

Q. And in this instance you mean by that in this case then seven or eight percent of the amount of the commitment, the commitment represents the amount of the mortgage, does it not?

A. Yes. Of course, the land is not included as a cost because it must be free and clear at the time of closing.

Q. How many times did you talk to Mr. Waxberg?

A. I don't recall talking to him more than two or three times at that date.

Q. How long did you work on this project, Mr. Sumter?

A. As I recall the application was started some time around the third week in January, 1950, and due to many conditions the loan was not closed until

(Testimony of Glenn Roy Sumter.)

I believe the summer of 1951 and the building was not completed until December or January of 1952, '3.

Q. Mr. Sumter, was the building as represented by these preliminary plans which were shown to you, was that building ever constructed?

A. No.

Q. Did you work on this particular project then from the second or third week of January until a building was completed? A. Yes.

Q. During the entire course of your interest in this project on how many occasions did you talk to Mr. Waxberg, if you know?

A. As I previously stated, I only recall talking to him two [205] or three times during the early part of 1950.

Q. And that is the only discussions that you ever had with him in connection with this project?

A. Yes.

Q. Do you know when the application for mortgage insurance was submitted? A. Yes.

Q. When was it submitted?

A. I would say the third, fourth or fifth of February, 1950.

Q. Where was the application filed?

A. In Juneau, Federal Housing Administration.

Q. By whom was it filed? A. I filed it.

Q. How did you do that?

A. We obtained the preliminary approval of the National Bank of Commerce around the first or second of February. They executed the application

(Testimony of Glenn Roy Sumter.)

which must come from a lender. We took the plans and other exhibits to Juneau.

Q. You took them to Juneau? A. Yes.

Q. Who accompanied you on that trip?

A. Mr. and Mrs. Hill, Mr. Waxberg and I believe Mr. Chiarelli.

Q. And that was early in February?

A. Yes.

Q. Do you recall having had any conversations with Mr. Waxberg prior to the time that you went to Juneau? [206]

A. Yes, I believe I met him prior to that time.

Q. Did you ever see him after that, after your trip to Juneau?

A. Yes, I believe I did.

Q. Do you know so far as your interest in securing this loan was concerned, do you know whether Mr. Waxberg performed any services at all in that regard?

Mr. Hepp: I object to that question. It is very vague and I think that it should be answered yes or no and if it is in the affirmative how he would know. I think the source of his information, I think it is purely an opinion and I object to it in its present form.

The Court: Objection is overruled. He may answer.

(Thereupon the reporter read the question.)

Mr. Sumter: Insofar as obtaining the FHA commitment or preparing the application he performed no services.

(Testimony of Glenn Roy Sumter.)

Q. (By Mr. McNabb): Now, what do you mean by preparing the application?

A. This instrument together with certain exhibits that we obtained from the architects. I am referring only to what was delivered to our office.

Q. And not what was submitted with the application?

A. Yes, what was submitted to our office from the architectural firm which we in turn submitted to the FHA.

Q. Let me ask you this, do you know who was solely responsible for the preparation of the application for an FHA loan? [207]

Mr. Hepp: I object to the question as leading and suggestive. There is no evidence that there was anyone solely responsible and I think the question should be rephrased.

The Court: I don't see how the witness can answer the question, but I will permit him to try.

Q. (By Mr. McNabb): Who would, was there anyone charged with the duty of preparing the application for loan? A. Our office was.

Q. Is there any question in your mind about that? A. No, there is no question.

Q. Who did the work? A. Our office.

Q. Who prepared the application?

A. Our office.

Q. Who filed it? A. I filed it.

Q. Did you ever request any assistance from Mr. Waxberg? A. Not to my knowledge.

Q. Would you know about it if you had?

(Testimony of Glenn Roy Sumter.)

A. I believe I would.

Q. Did you ever request any assistance from Mr. Orsini? A. No.

Q. Did either of those persons submit anything to you that you used in the application?

A. Not that I recall. [208]

Mr. McNabb: May we have a recess at this time, your Honor?

The Court: Yes, I think it is time for a recess. Members of the jury, please heed the admonition that I have previously given to you and we will recess for ten minutes.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon, at 11:20 a.m., the Court took a recess until 11:40 a.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: The parties waive the polling of the jury?

Mr. Hepp: We will stipulate that the jurors are present that were in this panel.

Mr. McNabb: Yes, your Honor.

GLENN ROY SUMTER

the witness on the stand at the time the recess was taken, resumed the stand for further direct examination.

Q. (By Mr. McNabb): Mr. Sumter, you are, of course, familiar with what is required to be filed with that application for insurance, are you not?

A. Yes.

(Testimony of Glenn Roy Sumter.)

Q. What is required to be filed with the application concerning the land upon which the building is to be constructed?

A. You must file a statement of ownership showing where either the land is in the name of sponsor or is under option or it will be obtainable. [209]

Q. And anything else concerning the land?

A. No.

Q. How does the FHA if you know, determine where the building is to be located?

A. As an architectural exhibit you file a survey which must carry the contour line usually referred to as a topographical survey.

Q. Do they require anything other than a, other than such a survey?

A. Not in a typical case. If there is evidence of slide or land erosion they might require additional engineering data.

Q. Was any additional engineering data required in this case with the application?

A. Not at the time the application was submitted.

Q. And so far as this building, that is when I say this building I mean the building as represented by the preliminary plans, was any additional engineering data required by FHA?

A. Not that I recall.

Q. Was a, do you know whether a drill log was submitted with the plans or the ground was drilled?

A. Not that I recall.

(Testimony of Glenn Roy Sumter.)

Q. Does the application show that such a log was in fact submitted with the application?

A. The application does not show it.

Q. Is such a log required under the act? [210]

A. Not as far as their preliminary processing is concerned.

Q. Mr. Sumter, I will show you Defendant's Identification C and ask you if you know what that is, sir?

A. It is a copy of FHA's commitment for insurance covering the Lacey Street apartments.

Q. Do you know when that was issued?

A. The latter part of February, 1950. It carries a date of February 24, but I don't believe it was received by the bank until the latter part, very close to the first of March.

Q. When the commitment was issued where was it issued, where was it executed?

A. In Juneau.

Q. And where was it sent?

A. To the National Bank of Commerce in Seattle.

Q. Why was it sent to the National Bank of Commerce?

A. They were the mortgagee at that time.

Q. What was the amount of that commitment, Mr. Sumter?

A. One million six hundred ninety-four thousand and two hundred dollars.

Q. Was that amount of money available for the

(Testimony of Glenn Roy Sumter.)

construction of the building which is represented by these preliminary plans?

A. That is the total amount of mortgage proceeds available.

Q. I know, now you didn't answer my question. Was that amount of money available to build this building? A. No, it was not available.

Q. Do you know what amount of that, or what part of that [211] amount was not available?

Mr. Hepp: I object to that unless this witness, he said this was forwarded to the First National Bank of Commerce or some other organization, and what they would loan. I believe that the best evidence would show from that organization and not this broker. I don't believe he could answer that question unless he guesses or just heard from somebody.

The Court: I believe, Mr. Hepp, he is trying to determine from the witness if he knows how much of the commitment was available for building purposes. He may answer if he knows.

Mr. Sumter: Not without the project analysis which was issued in connection with this.

Q. (By Mr. McNabb): Did you ever see a copy of the project analysis?

A. Yes, I have a copy of the project analysis.

The Court: If any members of the jury at any time can not hear it is important that you let the Court know because we want you to hear everything that is said and will Mrs. Templeton please

(Testimony of Glenn Roy Sumter.)

read back the last question and answer and we will proceed.

(Thereupon, the reporter read the question and answer.)

The Court: Is that satisfactory, members of the jury?

Q. (By Mr. McNabb): Do you know where that project analysis is?

A. In my files. They were at the—(Interrupted)

Q. Are these your files, Mr. Sumter? Not in this?

A. Those are my files but they don't pertain to this project. [212]

Q. You can produce that?

A. Yes, I can.

Q. It is in Fairbanks? A. Yes.

Q. Mr. Sumter, between the date of the application for insurance and the commitment or the issuance of the commitment is there anything at that time to be done by the sponsors or by anyone interested in securing the commitment?

A. As a rule there is nothing to be done. Occasionally they call for additional architectural exhibits.

Q. Was that done in this instance or do you know whether there was a request for any additional information in this instance? A. I do not.

Q. You do not know whether such a thing was done? A. No.

Q. Prior to the issuance of a commitment would a sponsor or does the sponsor normally investigate

(Testimony of Glenn Roy Sumter.)

concerning the cost of a building, the insurance for which is requested?

Mr. Hepp: Now just a moment, sir. I am going to object to that. If counsel wants to ask him whether it was done in this instance, I don't know whether what was normally done is pertinent to the issues before this Court.

The Court: Objection sustained.

Q. (By Mr. McNabb): Is there any assurance that a commitment will be issued [213] on the basis of an application?

Mr. Hepp: Now, I object to that. I think that is a matter for the offices of the FHA to give assurances rather than a broker. I object to this as this witness is not qualified to answer that question.

The Court: I will permit him to answer if he knows.

Mr. Sumter: There is no assurance when you make an application that a commitment will be issued.

Q. (By Mr. McNabb): Would any useful purpose be accomplished by an effort to ascertain the cost of the construction of this building by Mr. Hill prior to the issuance of the commitment?

A. I would say yes to satisfy yourself that the project is feasible if the amount you have applied for is granted.

Q. In this case was the amount which was applied for granted? A. No.

Q. Do you know whether Mr. Hill sought to establish by investigation the cost of the proposed

(Testimony of Glenn Roy Sumter.)

building prior to the issuance of the commitment?

Mr. Hepp: Now, I object to that as calling for hearsay. What Mr. Hill did is not a matter which this witness could answer to.

Mr. Sumter: I do not know.

The Court: He has answered he did not know.

Mr. Sumter: I do not know.

Mr. Hepp: I didn't understand the answer then. I see. I will not move to strike then.

The Court: It may stand.

Q. (By Mr. McNabb): Did you recommend to Mr. Hill that he ascertain the estimated cost of the construction of the building prior to the issuance of the commitment?

A. I do not recall doing so.

Q. Did you normally do that?

Mr. Hepp: Now, I object to that, what was done in normal instances.

The Court: Sustained.

Q. (By Mr. McNabb): Would you have, would that have been a part of your normal duties as an employee and the person engineering the issuance of such a commitment?

Mr. Hepp: Now, just a moment, sir. I object to the question as speculative. He can state whether or not he did that in this instance. What he would have done as a matter of normalcy is not pertinent to the issues before this Court.

The Court: Sustained.

Q. (By Mr. McNabb): Do you recommend to other sponsors that they ascertain prior to the time

(Testimony of Glenn Roy Sumter.)

the commitment that they determine the cost or [215] estimated cost of the building?

Mr. Hepp: I object to the offer in evidence, merely repetitious as previously questions that have been asked, not pertinent to the issues here.

The Court: Objection sustained.

Q. (By Mr. McNabb): In determining the amount of money for which a loan, for which insurance is granted or permitted, do you know how the FHA people arrive at the figure at which is indicated on the commitment?

Mr. Hepp: Just a moment, sir. I object to that as not calling for a proper offer from this witness, how the FHA does something, and I don't think it is pertinent to the issues before this Court. He can ask him whether it was done in this instance. I think that covers the field.

The Court: If he knows he may answer the question.

Mr. Sumter: Quantity estimate is made by their architectural department.

Q. (By Mr. McNabb): By whose architectural department?

A. FHA's architectural department, sent to their evaluation department and then to the mortgage credit department to determine the value of the land, the capitalization of the rentals and so forth and mortgage credit to determine the financial soundness of the project. [216]

Q. Do you know whether or not there was at the

(Testimony of Glenn Roy Sumter.)

time that this commitment was issued a maximum amount established by the FHA per unit?

A. Yes.

Q. Do you know that amount?

A. Ten thousand eight hundred plus ten percent of that amount for other income producing space which is usually of a commercial nature.

Q. Was there such other space proposed in this building? A. Yes, there was.

Q. So it would be ten thousand eight hundred dollars plus ten percent? A. Yes.

Q. That amount to eleven thousand eight hundred eighty dollars? A. Yes.

Q. You know how many units were planned for the, or anticipated in this building now under discussion?

A. As I recall there were a hundred forty some.

Q. Did Mr. Waxberg ever discuss with you his bonding capacity as a, as the contractor on this proposed building?

A. I do not recall having any discussions with Mr. Waxberg concerning it.

Q. Did you discuss his bonding capacity with anyone?

Mr. Hepp: I object to that. I don't think that is [217] pertinent here. Certainly no foundation for any kind of conversation that would bind either of the parties here.

The Court: Counsel hasn't gone far enough yet to permit me to know who was present and so forth. He may answer.

(Testimony of Glenn Roy Sumter.)

Mr. Hepp: Just yes or no then.

Mr. Sumter: That wasn't the question.

Q. (By Mr. McNabb): Did you discuss Mr. Waxberg's bonding capacity with Mr. Hill?

A. Yes.

Q. Do you know where that conversation took place? A. In Seattle.

Q. Did you ever see a copy of a financial statement of Mr. Waxberg? A. Yes.

Q. I will show you Defendant's Identification F and ask you if you know what that is, please. Would you like me to take these?

A. This is a copy of the financial statement of Mr. Waxberg delivered to our office.

Q. Mr. Waxberg delivered that to your office?

A. Yes.

Q. How much of a bond was required, or let me ask you this, was there a contractor's bond required under the section of the act which was, under which the loan was proposed here? [218] A. Yes.

Q. How much bond?

A. Not less than ten percent of the amount of the construction contract.

Q. How much of a bond or on the basis of that financial statement could Mr. Waxberg have received the required bond in this case?

Mr. Hepp: Now, I object to that. I don't believe this witness is able to answer that. What bonding companies will bond a contractor for is certainly not known by one man. Each company answers itself as to what it will bond and I object to the ques-

(Testimony of Glenn Roy Sumter.)

tion as highly unfair. He can state what he would bond Mr. Waxberg for.

The Court: Well, he is not in the bonding business as I understand it. I will sustain the objection.

Q. (By Mr. McNabb): Are you in the bonding business, Mr. Sumter? A. Yes.

Q. How many companies do you represent or do you approach as regards bonds of this type?

Mr. Hepp: Now, I object to the question. How many companies does he approach. I don't understand what that means. Either he is an agent for a company or not.

The Court: Yes, let's determine what he does in respect to bonds. [219]

Q. (By Mr. McNabb): What do you do in respect to bonds?

A. We submit them to insurance carriers.

Q. Normally, Mr. Sumter, does a company who writes bonds of the type here required grant to an agent the authority to bind it? A. No.

Q. Is a part of your business, that of securing bonds of this nature? A. Yes.

Q. How many different companies do you write bonds with?

Mr. Hepp: Now, I object to that question. I don't know what he means by writing bonds with. You mean sign the bond?

The Court: I don't understand it. I will sustain the objection.

Q. (By Mr. McNabb): With how many, with what number of bonding companies do you transact business?

(Testimony of Glenn Roy Sumter.)

Mr. Hepp: I object to that unless he defines what he calls transacting business. Buying a piece of stationery would be transacting business.

The Court: I think, Mr. McNabb, you should develop first the type of business that he does transact and then you can later go into the number. It isn't clear to the Court whether the witness on the stand is an agent of bonding companies, whether [220] he procures them for others and what he does do and I think the jury should know. You may proceed.

Q. (By Mr. McNabb): Do the companies which write bonds as the one of the type required under 608, do those companies grant to agents the authority to write bonds?

Mr. Hepp: I object to that. This witness can state if he has any authority from any company, but companies that write bonds and how they write them and who are their agents are certainly not relevant to the issues of this trial nor is it within the possible knowledge of this witness. He can state that he is an agent.

The Court: Objection sustained.

Q. (By Mr. McNabb): Are you the agent for any bonding company? A. Yes.

Q. What company?

A. Eight different insurance companies.

Q. Will you name them, please?

A. Continental Casualty, USF & G, General, United Pacific, Hartford, Firemen's, Pacific Indemnity.

(Testimony of Glenn Roy Sumter.)

Q. Do those companies write bonds of the type required under 608? A. Yes.

Q. Do you know their requirements before writing the bond? [221]

Mr. Hepp: I object to that as too general a question.

The Court: I think further, Mr. McNabb, you might show how long he has been such an agent.

Mr. Hepp: I would like also to be shown just exactly what constitutes an agency.

The Court: Very well. Proceed. It is now twelve o'clock or a little bit past. Maybe it is a good time for the noon recess and members of the jury, I admonish you to heed the admonition I previously have given to you not to discuss the subject matter of this trial with anyone; nor among yourselves; and not to express any opinion until the case is finally submitted to you.

Clerk of Court: Court is recessed until two o'clock.

(Thereupon, at 12:04 p.m., a recess was taken until 2:00 p.m.)

Afternoon Session

(The trial of this cause was resumed at 2:00 p.m., pursuant to the noon recess.)

The Court: Parties wish the jury polled?

Mr. McNealy: We will stipulate that they are all present, your Honor.

Mr. McNabb: We will so stipulate.

The Court: Very well. You may proceed.

GLENN ROY SUMTER

the witness on the stand at the time the recess was taken, [222] resumed the stand for further direct examination.

Q. (By Mr. McNabb): Mr. Sumter, were you able to find a copy of the project analysis?

A. Yes, I was.

Q. Would you show that to me, please. Could you remove it from your files. How did this instrument come into your possession, Mr. Sumter?

A. It was delivered to us from the National Bank of Commerce.

Mr. Hepp: I didn't hear the answer, sir.

Mr. Sumter: It was delivered to our office from the National Bank of Commerce, Seattle.

Clerk of Court: Defendant's Identification G.

(Project Analysis was marked Defendant's Identification G.)

Q. (By Mr. McNabb): By whom was **this instrument** prepared?

A. By the Juneau office of the Federal Housing Administration.

Q. Do you know when it was received by the bank?

A. The latter part of February or the first of March, 1950.

Q. Was that in company with other documents?

A. It was sent along with the, or the commitment for insurance and breakdown on the reserves and replacements. [223]

Q. Do you know whether this instrument is signed?

(Testimony of Glenn Roy Sumter.)

A. Yes, it is a signed copy.

Q. Are you familiar with the signature that is on it? A. No, I wouldn't.

Q. If you see the signature you will know whose it is? A. Yes.

Q. Now, I will show you the Defendant's Identification G, ask you for what purpose is that prepared?

A. It is the basis upon which the commitment is issued.

Q. Does that instrument indicate the amount of money that would have been available to construct the building the basis of which are these preliminary drawings? A. Yes.

Q. How much money would have been available to construct the building?

A. May I explain it? I mean I can't just pull a figure out.

Q. Yes, of course. I think the Court would expect you to or desire that you do that, would you not?

The Court: I don't know just what he wishes to explain.

Mr. Sumter: I was asked the amount available for construction.

The Court: Yes. Can you determine that from that document?

Mr. Sumter: Yes, I can, your Honor, but I would have [224] to start with the mortgage figure and deduct items which they set aside and are not available.

(Testimony of Glenn Roy Sumter.)

The Court: Then you may proceed and so explain it to the jury.

Mr. Sumter: The mortgage was in the amount of one million, six hundred ninety-four thousand, two hundred dollars. From that amount they deduct a hundred thirteen thousand, two hundred sixty-four dollars, which they classify as carrying charges and financing expenses. It is made up of interest during construction, taxes and so forth. Then from that figure you would also deduct the architect's fee which in this case was eighty thousand one hundred nineteen dollars. Deducting those two amounts from the one million six hundred ninety-four thousand two hundred you would arrive at the funds available for construction.

Q. (By Mr. McNabb): And what amount was that that deductions having been made or is it computed there?

A. It is not computed. You would have to compute it. It would be roughly a million five.

Q. And that under this commitment is the maximum amount that could have been used to construct the building if all of the other charges and expenses had been paid?

A. From mortgage proceeds, yes.

Q. Mr. Sumter, at the time that you submitted the application for the loan for the insurance, of all of the items that you [225] submitted, had Mr. Orsini assisted you in preparing or compiling any of that information?

A. None of it that went through our office.

(Testimony of Glenn Roy Sumter.)

Q. Did you submit the financial statement of Mr. Waxberg to any bonding company?

Mr. Hepp: Now, I object to that question. I don't think that that is relevant or pertinent here. This man says that he was not authorized to issue bonds.

The Court: He may answer.

Mr. Sumter: Yes, I did. I submitted it to three companies.

Q. (By Mr. McNabb): Was a bond issued on that application?

A. We did not submit it for, to obtain a bond but to determine whether or not they would accept the application for a bond.

Q. Did you receive a response to your inquiry?

Mr. Hepp: Just a moment, I object to that as pure hearsay. Not within the knowledge of this witness.

The Court: He can state whether he received a response, just yes or no.

Mr. Sumter: Yes.

Q. (By Mr. McNabb): What was that response?

Mr. Hepp: I object to that as hearsay. [226]

The Court: It is not the best evidence. Sustained.

Q. (By Mr. McNabb): Do you have any correspondence in your file to indicate the response?

A. No. I had a discussion with Mr. Hill.

Q. But you have not with you— (Interrupted)

A. I have no correspondence regarding the bond.

(Testimony of Glenn Roy Sumter.)

Q. Do you know whether a bond was ever issued to Mr. Waxberg?

A. Not to my knowledge.

Mr. McNabb: You may take the witness.

Cross Examination

Q. (By Mr. Hepp): Mr. Sumter, I understand you to say there was a commitment issued in this instance? A. Yes, there was.

Q. Does it follow from that that a bond is not necessary as of the time of the commitment, for a commitment?

A. A bond is only needed at the time of closure.

Q. But actually the issue of bonding of Mr. Waxberg was not of any immediate importance for the acquisition of a commitment, is that right, sir?

A. It had nothing to do with the issuance of the commitment.

Q. Had nothing to do with it at all?

A. No, sir.

Q. How large is your firm that you work with or for? [227] A. In what respect?

Q. In number of personnel? A. Six.

Q. There are six people employed?

A. Yes.

Q. And principal portion of your business during the periods of time which you have covered in your direct examination were in processing FHA applications or applications for FHA mortgage insurance?

A. I would say a good fifty percent of it.

(Testimony of Glenn Roy Sumter.)

Q. About fifty percent of it. You are not a money loaning institution yourself?

A. Yes, we are.

Q. You are? A. Yes.

Q. Did you consider loaning money on this project? A. No.

Q. You brokered the matter, I believe you testified to? A. Yes, sir.

Q. Just what is a broker, sir, in the sense that you use the word here?

A. You originate and obtain interim financing and permanent financing.

Q. In an instance such as the case at bar here, that is to say this application which was made to the FHA, you did the work of compiling the information on this application and submitted it [228] to the FHA, your firm did that? A. Yes, sir.

Q. Now, where do you get all your information for compiling that?

A. Well, the architectural exhibits are obtained from the architect. The miscellaneous exhibits are usually obtained from the sponsorship.

Q. Actually, Mr. Sumter then Mr. Waxberg could have done a considerable amount of work for the architect and still you would have had no direct dealing with Mr. Waxberg, is that, could that not have been?

A. That could have been, yes.

Q. The fact that you only had two or three conversations with Mr. Waxberg or in fact no conversations at all has no bearing on whether or not he

(Testimony of Glenn Roy Sumter.)

did work which directly or indirectly assisted in the filing of this application, is that true?

A. I believe I stated the work would have had to have been done prior to February the 4th.

Q. Sir?

A. I believe I clarified that that the work would have had to have been done prior to February 4th, 1950.

Q. For this application? A. Yes.

Q. Is it your experience customary for builders to work with architects in the compilation of data to submit plans and [229] specifications for a proposed building for which government insurance is applied for?

A. In most cases the builder is the sponsor.

Q. In most instances the builder is the sponsor?

A. Yes.

Q. Nothing unusual about Mr. Waxberg having been a builder here in this instance and, therefore, a sponsor? A. No.

Q. Could have done, so far as you know could have done quite a bit of work together with the architect in getting the material that you needed, is that right, as far as you know?

A. Yes, prior to February 4th, 1950.

Q. Mr. Sumter, how long does it generally take you to, or did it during the days of FHA how long did it usually take you to process an application into the FHA for mortgage insurance?

A. A week to ten days.

Q. A week to ten days. That is when all the

(Testimony of Glenn Roy Sumter.)

material was ready to go or when, what period of times does that contemplate?

A. I would say, well, I would say from the time we first discussed the case and its going to be developed it will take a week to ten days to get the architectural exhibits and the other information processed through our office or through the bank.

Q. You mean an architect can draw plans, figure out a building, draw plans like this in a week?

A. A week to ten days. [230]

Q. A multiple story building?

A. Yes, keeping in mind that those are not any more than an outline of the plan and an outline of the specifications.

Q. Well, how are the original figures for which an application is made determined then? I hear the figure one million six or seven hundred thousand dollars which you referred to, the application; how is that figure arrived at?

A. At the time this was processed the maximum loan in the Territory on this type was ten thousand eight hundred dollars per unit and it was quite generally felt that it was far below the cost in the Territory so I believe this figure was merely a projection of the ten thousand eight hundred per unit times the number of units proposed plus an allowance for commercial space.

Q. As of January of 1950 had you done very much business in the Territory of Alaska?

A. Oh, we had had about fifteen to eighteen million.

(Testimony of Glenn Roy Sumter.)

Q. Fifteen to eighteen million?

A. Yes, sir.

Q. I don't understand the figure, you mean as an aggregate of— (Interrupted)

A. Mortgage loans.

Q. Applications for mortgage loan insurance?

A. Mortgage loans placed, yes.

Q. Did, did Mr. Hill assist you in any way in the making out of this application? [231]

A. Not in making out the application. He supplied the exhibits which we needed.

Q. Would it have been entirely possible that Mr. Orsini may have supplied Mr. Hill with lots of the information that he in turn tendered to you in the form of exhibits or material that would be made into exhibits?

Mr. McNabb: Object to that until such time as the proper foundation has been laid for it.

Mr. Hepp: I believe, your Honor, it is directly in point of the direct examination.

The Court: He may answer.

Mr. Sumter: I wouldn't have any knowledge as to the source of these exhibits.

Q. (By Mr. Hepp): What kind of information did Mr. Hill submit to you?

A. Information that took probably five minutes to obtain up here. It is a zoning letter, a picture, a city map.

Q. A survey?

A. No, I believe the survey was furnished us through the architects.

(Testimony of Glenn Roy Sumter.)

Q. Mr. Hill didn't furnish that?

A. No, it is part of the architectural exhibits.

Q. Is there a financial statement of Mr. Hill as a part of this transaction? A. Yes. [232]

Q. Do you get those in five minutes, Mr. Sumter?

A. I believe the financial statements of both Mr. Hill and Mr. Waxberg were delivered either at the time of our original meeting or shortly thereafter.

Q. I don't believe you responded to my question, do you get up financial statements in five minutes? You stated that Mr. Hill tendered the information to you that he could have obtained in five minutes. Now, I was just asking you a little bit more along those lines.

A. It all depends how you conduct your business.

Q. Well, has it been your experience that people get financial statements up in five minutes?

A. These statements were over thirty days old.

Q. I don't mean to be critical, Mr. Sumter, what I want to find out is what kind of information it was necessary for Mr. Hill to tender to you, the necessary information for you to make up an application and whether or not that could have involved such special services as a builder and a man like Mr. Orsini, if you know him?

A. Could it have involved them?

Q. Yes.

A. Well, I imagine it could have.

Q. They could have spent quite a bit of work

(Testimony of Glenn Roy Sumter.)

in getting the material which Mr. Hill supplied to you which culminated in your application to the FHA, is that right? [233]

A. Other than the financial statements I would say no.

Q. On which of these documents, Mr. Sumter, is there a listing of those exhibits which are necessarily accompanying?

A. It is application for mortgage insurance.

Q. Now of, I believe you read this list off once, list of exhibits. Now, I will read them through and you state which of these you compiled yourself and which you relied upon other people to give you.

The Court: Pardon me, counsel, what exhibit is that?

Mr. Hepp: This is Defendant's Identification B, entitled application for mortgage insurance.

Q. (By Mr. Hepp): There is a legal description, did you get that yourself or your company, Mr. Sumter, or was that supplied to you?

A. That was supplied to me.

Q. Letter re ownership?

A. We prepared that.

Q. You prepared that. On your own information or information that was given to you by Mr. Hill?

A. Mr. Hill's information.

Q. Letter re zoning?

A. Supplied by Mr. Hill.

Q. Photographs?

A. Supplied by Mr. Hill.

Q. City map? [234] A. Mr. Hill.

(Testimony of Glenn Roy Sumter.)

Q. I see here FH 21 A Department of Labor form?

A. That was prepared by the architects, prevailing wage.

Q. Personal financial credit statement?

A. Mr. Hill. Mr. Waxberg.

Q. Form FHA 2013 E?

A. We prepared that.

Q. And four architectural exhibits?

A. Supplied by the architects.

Q. In your experience as a mortgage processor, Mr. Sumter, haven't you found that a builder has to rely quite a bit on quite a few tradesmen and crafts in order to compile the information that you require of him in order to successfully process an application, in your experience?

A. I don't believe so at that time.

Q. Why is it then that builders are often sponsors if they are not necessary?

A. I didn't say a builder wasn't necessary.

Q. As of the time of the commitment?

A. Well, then I misunderstood your question. You asked if it was necessary to contact all the subs.

Q. Oh, I don't believe I asked you that question, sub-contractors?

A. I misunderstood you.

Q. Talking about the people that get up financial [235] statements, zoning maps, general building plans, ideas, all those things which make up a

(Testimony of Glenn Roy Sumter.)

man's mind that he comes to you and decides he wants to build a building?

A. Well, their mind is usually made up before they come to me.

Q. Has it been your experience that builders are often sponsors by reason of the fact that they have been a very center part of that mind making before they come to you?

A. Well, as I stated before in ninety-five percent of our cases the builder is the sponsor.

Q. In this instance if you hadn't had another sponsor with Mr. Hill you would have been unable to get a mortgage as I understand Mr. Hill's finances were not adequate in themselves, is that right?

A. His cash position was not adequate. His financial statement was adequate.

Q. Well, is it reasonable to believe that by reason of the fact that there is a co-sponsor on there that it served some purpose?

A. I searched through my records. I don't find where Mr. Waxberg's financial statement went to Juneau.

Q. Why then was Mr. Waxberg a co-sponsor on this if you know?

A. Because of his participation of builder's fee.

Q. It would be highly speculative, would it not, Mr. Sumter, [236] to say that the commitment would have been issued had he not been on there, be highly speculative to guess what the FHA might have done under those circumstances?

(Testimony of Glenn Roy Sumter.)

A. It was re-issued without his name on it.

Q. I am not talking about a re-issue. I am talking about this issue?

A. Could I have the question read.

(Thereupon, the reporter read the question.)

Mr. Sumter: No, I would not say it would have been highly speculative.

Q. (By Mr. Hepp): Just went along for the ride. No particular point in being on there except they decided to type his name in. Is that what you are asking this jury to believe?

A. I don't believe that is what you asked me.

Q. Well, in the course of your direct examination it seems as though numerous statements came from you indicating that you had had little or no conversation with Mr. Waxberg, that his position in this matter or purpose or usefulness was not very apparent and I would merely like to find out for my own satisfaction possibly for the jury, whether or not Mr. Waxberg served any useful purpose in this application for this commitment for Mr. Hill, in your opinion?

A. I believe, sir, what I said was that I had no knowledge of work that he might have done. [237]

Q. Could have done a lot?

A. He could have.

Q. Been very instrumental in the procurement of this whole thing? A. What whole thing?

Q. The commitment, the ultimate issuance of a commitment?

A. No. Prior to the presentation of the com-

(Testimony of Glenn Roy Sumter.)

mitment or the application yes, he could have been.

Q. I mean the commitment is issued on the basis of an application?

A. That is true. You said base.

Q. I will rephrase it, use the word application?

A. Yes.

Q. Mr. Waxberg could have been very useful possibly even indispensable in compiling the information, getting the application ready for filing?

A. You mean the exhibits of the application?

Q. Yes.

A. That would be possible.

Q. Possibly even Mr. Orsini did some very valuable and essential work?

A. I haven't any idea what Mr. Orsini did.

Q. He could have as far as you know?

A. I don't know what Mr. Orsini does.

Q. I believe you testified that you, one of the purposes which you serve the public, or I should say strictly a portion [238] of the public in terms of your clientele is to screen applications so that project sponsors would not go ahead if it were unfeasible.

A. That is true.

Q. Did you screen this project? A. Yes.

Q. And it went ahead though to the point of making application for the loan? A. Yes.

Q. Now when did, if you know, the FHA as it applied to Alaska, Public Bill 608 I believe it has been referred to here— (Interrupted)

A. Title 6, Section 608.

Q. Is that in force now? A. No.

(Testimony of Glenn Roy Sumter.)

Q. When did it cease to exist?

A. I believe the last day of February, 1950.

Q. This then if I am to judge by the dates that have been mentioned in this cause slid under the deadline so to speak?

A. So far as 608 was concerned, yes.

Q. Now, did this commitment which was issued by the FHA, we are talking about, was that used in any way, of any ultimate commitments that might have been given to Mr. Hill for the building of any building such as the Polaris Building?

A. It was extended, I believe, for a year before it was reprocessed. [239]

Q. If that commitment had not been obtained could Mr. Hill have procured an FHA loan to build the Polaris Building? A. Yes.

Q. After the deadline?

A. That is only a portion of the housing act.

Q. Oh, I see, but did you go through under the same, in other words was there a new commitment issued or was there a revised commitment issued, if any?

A. It was a revised commitment.

Q. It was actually a revision of the original on which Mr. Waxberg was the sponsor, is that right?

A. Yes, I believe they referred to it as an amended commitment.

Q. Now, Mr. Sumter, after you had made up this application for Mr. Hill conceivably stopping at that point, had you earned any fees at that point?

A. No.

(Testimony of Glenn Roy Sumter.)

Q. With Mr. Hill? A. No.

Q. What was the arrangement with Mr. Hill for your pay or do you work for free?

Mr. McNabb: Just a minute, I am going to object to that as having no bearing on the issues of this case, improper cross examination.

The Court: I can't see the bearing. I will sustain the objection. [240]

Q. (By Mr. Hepp): I think in the course of your testimony you said that no drill log was submitted?

A. I said to my knowledge there was no drill log submitted at the time the application was sent in.

Q. That would be to the FHA?

A. That is right.

Q. Your statement was confined to that?

A. Yes.

Q. Would you be in a position to state that no drill log was necessary for the architect to compile the information that you deemed necessary to put in the application?

A. For the preliminary plans I would doubt if a drill log was necessary.

Q. Are you acquainted with that subject matter? A. Yes.

Q. Just what does an architect supply to you when you make an application for FHA, Mr. Sumter?

A. In the way of architectural exhibits?

Q. You mean like this.

(Testimony of Glenn Roy Sumter.)

A. Is that what you are asking?

Q. I mean what does he supply you with?

A. Supplies me with what, with a preliminary set of plans and an outline of specifications.

Q. Is it in your mind that a building can be designed even preliminarily to the extent which these plans show without having [241] some concept of the foundation that is necessary to support the building and the costs? A. Yes.

Q. They are not a factor?

A. The survey is a factor.

Q. I am talking about the foundation of the building? A. Is it possible to?

Q. To even get a summary idea of construction costs or building size within a limited budget without knowing foundation information?

A. Foundation information is usually obtained after the FHA commitment is issued.

Q. It is also a necessary part of an architectural, architects necessary information for drafting and designing a building though, is it not?

A. Definitely, especially in soil conditions such as you have up here.

Q. Where there may be permafrost or glacial conditions under the surface. Very important?

A. Yes, but not at that stage.

Q. Well, precisely just what is done when people plan to build a building and get a mortgage financed, how far do they usually go in their plans up to a point where you designate, or do they generally formulate the whole building, or do you know?

(Testimony of Glenn Roy Sumter.)

A. Until the plans have been processed through FHA you [242] hardly know what you are going to build. If you will look on the back of your commitment you will see twenty or thirty some items that require corrections to the plans. Also you will see an item there regarding foundation. There is no allowance given by FHA beyond a normal foundation.

Q. Sir?

A. I say there is no allowance given in costs by FHA beyond the normal foundation.

Q. But that information may have been extremely critical to Mr. Hill in deciding whether he wants to build a building or to an architect who is advising him whether or not the building he conceives is feasible?

A. I would say it would be impossible for the architect to complete his plans without finding out what is in the ground.

Q. A drill log then, Mr. Sumter would, is not a useless piece of information, is it?

A. Certainly not.

Q. A very necessary part of information at one phase or another, one stage or another of the building?

A. That is the start of the building.

Q. Where are you staying here in Fairbanks?

A. Over at the Polaris.

Q. Are you guest of the Hills?

A. Yes, I am.

Q. I believe you made a statement that it was

(Testimony of Glenn Roy Sumter.)

something in [243] terms of not necessarily, to get government insurance on a mortgage, that private capital is available for building large buildings or some words to that effect; in other words whether or not the FHA, RFC or some other government money, I think that counsel used, you indicated in an answer or did you that government money is not indispensable in building a building; that brokers do farm out loans or arrange for loans that are not necessarily FHA financed or guaranteed?

A. Well, to clarify what I thought was asked me, whether or not FHA invests or lends money in connection with these loans, which is not the case.

Q. No, I don't believe that was my question. I will rephrase the question to you. Have you ever brokered a loan at a level of one and a half million dollars or more without a guarantee up here in the Territory of Alaska? A. No, sir.

Q. FHA, RFC or some government source was virtually indispensable in Mr. Hill's financing and building up here then of the size and magnitude which he contemplated?

A. The insurance was necessary.

Q. The insurance? A. FHA.

Q. Well, that is sort of a guarantee the government guarantees that the money loaner will not lose or at least a certain percentage of his money or something? [244]

A. Well, it is FHA insurance as against the GI or veterans guarantee.

Q. But you have never brokered a loan of that

(Testimony of Glenn Roy Sumter.)

magnitude without having a government guarantee of some sort, insurance, I mean government money as it is sometimes loosely referred to?

A. Without insurance. We have sold many loans up here with insurance to private lenders but only with insurance.

Q. But they all involved a government agency at one way or the other at the level of a million and a half or more, is that right, the ones you have had experience with? A. Yes, sir.

Q. Would you undertake to process financing a building through a money lending organization of a million and a half dollars for the type of building which Mr. Hill conceived and planned without going to a government agency beforehand and obtaining a commitment; would you undertake that project if somebody were to come into your office and say, I would like to buy a million dollars and a half, or ninety percent of a million dollars and a half to build a building up in Fairbanks; do you think you would, you could farm that loan out unless a government insurance or government guarantee of some sort? A. I do not.

Q. The participation of government is indispensable?

A. In the Territory, I would say yes.

Q. To Mr. Hill as well as others? [245]

A. Yes.

Mr. Hepp: I believe that is all the questions we have of this witness.

(Testimony of Glenn Roy Sumter.)

Redirect Examination

Q. (By Mr. McNabb): Mr. Sumter, I believe that in Mr. Hepp's examination, or cross examination he asked you a question substantially as follows. Could not Mr. Waxberg have supplied information which was very useful or practically indispensable which was submitted with the application. What information could Mr. Waxberg have collected which was practically indispensable?

A. It would have to be in connection with the plans.

Q. What could that have been, sir?

A. Well, I really don't know.

Q. You have no way of knowing?

A. I have no way of knowing.

Q. At what stage of the proceedings do the costs of construction become important?

A. After the commitment is issued and you meet the requirements of FHA.

Q. And only then?

A. Prior to that date your costs have little meaning except the feasibility of erecting the building.

Q. At the time of the preparation of the preliminary plans, preliminary specifications up to that times does the architect make any estimate of the cost of construction? [246]

A. I notice on the application they list under "A" architectural exhibit trade payment breakdown. I don't have a copy of it and I really don't know

(Testimony of Glenn Roy Sumter.)

how it was prepared, but it would parallel the application figures.

Q. But let me ask you this, until such time as there is a commitment issued so that you then know how much money is available costs of construction are not critical, are they? A. No.

Q. Was there another section of the, or another applicable act under which this building could have been constructed? A. Yes.

Q. Did it expire on the 28th of February of 1950?

A. It is part of the permanent housing legislation and it is still in effect.

Q. And that would have covered this building as well? A. Yes.

Q. Mr. Sumter, at the time of the preparation of the final plans for a building is a drill log of the ground, of the location of which the building is to be constructed an important item?

A. At the time the final plans are being prepared?

Q. Yes. A. Definitely.

Mr. Hepp: Excuse me, your Honor. I am going to object to that unless he states important to whom. I don't understand. It is a very general question. It may be extremely important to [247] the architect and an absolute matter of indifference to a broker.

The Court: I believe the objection is well taken and the important to whom should be emphasized in the question. Objection sustained.

Q. (By Mr. McNabb): I believe you made some

(Testimony of Glenn Roy Sumter.)

statement concerning FHA allowing only a specified amount for foundation, is that true?

A. I believe what I said is that they disallow any excess costs of foundation beyond that of the normal.

Q. So then in the preliminary plans which are submitted with the application all that is necessary is a plan which is made in conformity with FHA requirements which is universal throughout the United States and Alaska?

A. No, it is not that universal. It is in areas covering certain groups of states.

Q. Then for so long as the preliminary plans are in conformity with the requirements for the particular area that is all that is necessary?

A. Yes.

Q. And regardless of the condition of the ground for so long as the original plans meet the FHA requirements that is all that is necessary?

A. In so far as preliminary plans are concerned.

Q. And the actual condition of the ground does not become important until such time as final plans are in preparation, is [248] that true?

A. That is right.

Q. Consequently the conditions of ground upon which this building was to be constructed was not important to anyone in the preparation of the preliminary plans?

Mr. Hepp: I object to that, your Honor. This is a redirect examination and that is a, I mean it

(Testimony of Glenn Roy Sumter.)

calls for a yes or no answer. We object to that form of a question.

The Court: Sustained as leading and suggestive.

Q. (By Mr. McNabb): Was a drill log of the property upon which this building was to be constructed necessary or essential to the preparation of the preliminary plans? A. No.

Mr. McNabb: We have no further questions.

Recross Examination

Q. (By Mr. Hepp): Mr. Sumter, now FHA, if FHA disallows excess costs and foundation which necessarily would be a matter of additional private financing of a builder wouldn't the idea of foundation costs be of utmost importance to a builder in terms of feasibility whether he is going to go ahead if he has to carry the excess costs as a matter of private financing, you say it being disallowed, the excess?

A. It would certainly be of interest to someone.

Q. To the builder, to Mr. Hill would it be?

A. Whoever was going to pay for it I would say.

Q. Well, in the case of the building, of Mr. Hill's building who would pay the excess costs over and above that which the mortgage money would cover as guaranteed by the government or insured by the government, wouldn't Mr. Hill be paying for them? A. Yes, certainly.

Q. Wouldn't it be of utmost importance to him to know whether there were going to be excessive

(Testimony of Glenn Roy Sumter.)

costs before he even so far as bothered to start an application?

A. The theory of preliminary processing is to hold the costs down to the sponsorship until they obtain a commitment.

Q. Well that, sir, may be your part of this whole thing, but projecting it from Mr. Hill's point of view, would your answers be the same as to what is important? I am gathering that you deem important those things which you need to get an application through, that is something a little bit different or maybe than what Mr. Hill wants to know before he decides to even pay you or anybody else to run through an application and go through the fuss of trying to get a commitment, is that not right?

A. Well, I don't know what Mr. Hill deems important.

Q. Your answers are confined then to just what you need as a broker and not what is necessarily needed in a project like this, is that right?

A. I deem those things important that are needed for the [250] processing of the application.

Q. There may be many other things that are very important to Mr. Hill?

A. That could be very true.

Q. Now, you say there is another section under which this building could have been built; why didn't you use that instead of revising this original commitment?

Mr. McNabb: I object to that as not being proper recross examination; not within the issues.

(Testimony of Glenn Roy Sumter.)

The Court: Overruled. He may answer.

Mr. Sumter: The matter of fees. He paid three and a half per thousand for the processing of this application. In order to switch to a Section 2070 he would lose his entire fee. Also the charter under which the 608's were controlled by the Federal Housing Administration was far more lenient than the charter under Section 207.

Q. (By Mr. Hepp): Do you know what three percent of this building would amount to?

A. I am sorry, three-tenths of one percent.

Q. How much would that amount to?

A. Around forty-eight hundred dollars.

Q. Forty-eight hundred dollars, and you say in addition to that the law under which the original 608 was considerably more lenient? I didn't quite understand you. [251]

A. The charter that the FHA requires was far more flexible as to how you operate under 608 than it is under Section 207.

Q. How you operate the building or operate what?

A. These projects are controlled by the ownership of stock, preferred stock held by the Federal Housing Commission. They exercise controls over the operation through the ownership of this stock and as such he injects certain controlling articles into the charter.

Q. Well, in summary form the fact that you did get the commitment which Mr. Waxberg co-sponsored revised rather than going ahead was done

(Testimony of Glenn Roy Sumter.)

for a good reason and, therefore, we can assume, can we not, that that commitment was of some value or otherwise you wouldn't have had it revised but would have gone ahead under the new law, is that right, sir?

A. Yes, it was worth forty-hundred dollars.

Q. In terms of cash, and in terms of leniency and operation it could be an unmeasurable value but nevertheless in terms of dollars and cents of considerable value to an owner, is that right?

A. Yes.

Q. In fact for years to come Mr. Hill could profit as an owner one way or the other directly or indirectly by the fact that you had revised the commitment which Mr. Waxberg co-sponsored, is that right?

A. I don't think the charter controls are of that *important*.

Q. Sir? [252]

A. I say I don't believe the charter controls are of that importance.

Q. What importance are they?

A. One is a little easier than the other, but it is nothing you would reject over the years as benefits.

Q. Up to this point then at least there have been benefits gained under the commitment which Mr. Waxberg co-sponsored?

A. I think the forty-eight hundred dollars or thereabouts is.

Q. In terms of cash?

A. Is the greatest import.

(Testimony of Glenn Roy Sumter.)

Q. You couldn't categorically state from that stand that you could put this thing together and broker it under the new law. You might believe you could. Can you categorically state you could have?

A. Yes.

Q. Yes?

A. Yes.

Q. How do you know what the FHA is going to do, you have an inside track?

A. The title 2, Section 207 has been on the books since 1938. It was never used during the period of time that 608 was available. The processing is identical or was at that time, I should say.

Q. You can state categorically that you could put an application through under a different section.

A. Well—(Interrupted) [253]

Q. I am not asking you whether you have had good success in the past. I am asking you whether you could state categorically that you could do that?

A. I would say yes.

Q. You know what a government agency is going to do. They will approve an application of yours?

A. You asked me if I could put a similar application through as I understood you.

Q. And receive a commitment. I mean I suppose anybody could file a paper?

A. Sir, I told you no one knows they are going to receive a commitment until it is issued.

Q. Then you cannot categorically state that the application you put in in behalf of Mr. Hill would

(Testimony of Glenn Roy Sumter.)

have resulted in a commitment under a different law than 608?

A. I can never state when I put an application in that it is going to result in a commitment, but I could file the same application that I did under 608.

Q. Why did you file under 608?

A. Because it was still in existence and they were not using 207.

Q. And to save forty-eight hundred dollars?

A. The law had not expired when we filed this.

Q. I am talking about an application for revision now?

A. Why would we file a new application when we had one [254] outstanding?

Q. I don't know. I am asking.

Q. What did you ask me.

The Court: I believe the witness has answered that.

Mr. Hepp: I believe so. I will withdraw any further questions. Excuse me, I believe we have no further questions.

The Court: It is three o'clock and members of the jury I ask that you, please, heed the admonition previously given to you and we will take a ten minute recess.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon, at 3:00 p.m., the Court took a recess until 3:10 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: The parties wish to stipulate that the

(Testimony of Glenn Roy Sumter.)

twelve persons in the box are the jurors duly impaneled and sworn to try this cause?

Mr. McNealy: The plaintiff will so stipulate.

Mr. McNabb: The defendant will so stipulate.
Are you finished with Mr. Sumter?

Mr. Hepp: We are, sir.

(Witness excused.)

Mr. McNabb: Mr. Waxberg, will you take the stand, please.

A. E. WAXBERG

the plaintiff, called as a witness in behalf of the defendants, [255] having been previously sworn, resumed the stand and testified further as follows:

Direct Examination

Q. (By Mr. McNabb): Mr. Waxberg, do you recall the first occasion upon which you talked to Mr. Hill concerning the construction of a building?

A. As I recall it was in December of 1949.

Q. Do you recall when in December of 1949?

A. No, I don't.

Q. I believe you previously testified that that conversation took place in your office?

A. It did.

Q. And Mr. Berklid may have been around?

A. He may have.

Q. Do you recall how many times you discussed the construction of the building with Mr. Hill in December? A. No, I don't.

Q. Was it more than one time?

A. It was continuous until the time I was out.

(Testimony of A. E. Waxberg.)

It might have been every other day; two weeks might have gone by, but it was continuous conversation on, on building from, until I was let out of the building.

Q. Well, you do know that Mr. Hill wasn't in Fairbanks all of December, do you not?

Mr. Hepp: Now, I object to that unless there is some showing that this witness would know where Mr. Hill was. [256]

Mr. McNabb: It doesn't make any difference where Mr. Hill was.

The Court: You can ask him if he knows.

Q. (By Mr. McNabb): Do you know where Mr. Hill was, whether Mr. Hill was here all of December?

A. No, I don't.

Q. Do you know that he was not here part of December?

A. I do remember they went down to visit their boys, but I don't know how long they were gone or anything about it. When they left or when they came back. I do know they were out visiting their boys.

Q. Now, there was some discussion if I recall correctly concerning the construction of a building, the plan for which was prepared by Alaska Architectural?

A. It was just a preliminary drawing, one sheet, I believe it was.

Q. Did you discuss that during December or subsequent to December?

Mr. Hepp: I object to that, not within the is-

(Testimony of A. E. Waxberg.)

sues. Besides repetitious, was gone into by counsel on the previous examination.

The Court: He may answer.

Mr. Waxberg: How was the question again?

Q. (By Mr. McNabb): Did you discuss construction of the building as outlined [257] by the one-page draft by Alaska Architectural Engineering with Mr. Hill in December?

A. Must have. Yes, to some extent.

Q. Do you recall now how much of that time was spent discussing that building?

A. No, I don't. It couldn't have been, it couldn't have been very much because it was, as I recall it, it was nothing that we wanted to go through with.

Q. I'm sorry, Mr. Waxberg, will you say that again, please?

A. I say I couldn't have discussed it with him very many times because as I remember it was decided very shortly that it wasn't what he wanted to go through with.

Q. Who decided that?

A. Well, possibly Mr. Hill upon my advice or he might have taken it upon himself. I don't know.

Q. What advice did you give Mr. Hill in that regard? A. Well, I don't remember.

Q. Did Mr. Hill say to you that he had abandoned that idea?

A. I don't recall that.

Q. Do you now recall what sort of a building it was? A. No, I don't.

(Testimony of A. E. Waxberg.)

Q. Did you do any investigating at all concerning the construction of that building?

A. Not that I remember of.

Q. Do you know how much was, what was the first building; [258] do you know what the first building was that was discussed by you and Mr. Hill?

A. No, I don't. I don't remember.

Q. And you don't recall how much time you spent discussing that?

A. No, I don't remember.

Q. Do you know whether you spent the entirety of the time between the first meeting and when Mr. Hill went to visit his boys concerning that building?

A. That I don't know. I don't know when Mr. Hill went to visit his boys.

Q. During the month of December did you discuss the construction of another building?

A. That I don't remember.

Q. You may then have spent the conversations that you had in December discussing either the construction of any building or the construction of the particular building the preliminary draft of which you had which was prepared by Alaska Architectural?

A. I suppose so.

Q. When, at what stage of the proceedings—let me ask you this. Did you have any personal conversation with Mr. Hill that you now recall between the time that Mr. Hill went outside to visit his boys and when you saw him in Seattle on the 29th day of January?

A. It is pretty hard to remember. [259]

(Testimony of A. E. Waxberg.)

Q. Well, do you have any present recollection of such a discussion, meeting with him?

A. Well, I feel that I have had through phone calls or else seeing him, one or the other, or I wouldn't have been able to have been instructed to get a drill log. Maybe I talked to the architect, I don't remember, but it was in January I had this drill log made.

Q. Did you ever agree with Mr. Hill to construct the building as represented by the drawing of Alaska Architectural?

A. I don't remember that conversation at all, or anything about that.

Q. When did, or do you have any recollection now of when you agreed to build a building for Mr. Hill?

A. Well, it was a mutual agreement on this FHA where I was co-sponsor, but what time we started that I don't remember, sponsored it, form of mutual partnership I should say.

Q. Do you now have any recollection of Mr. Hill telephoning you while he was outside?

A. Numerous times, yes.

Q. Was it during a conversation, a telephone conversation that you agreed with him to construct a building?

A. That I don't remember.

Q. The construction of any building—let me ask you this, was the construction of a building by you for Mr. Hill contingent upon the happening of any event? [260]

A. Providing we get the commitment, yes. That was the agreement.

(Testimony of A. E. Waxberg.)

Q. The money had to be available first?

A. That's right.

Q. Do you have any recollection now of when you first became aware that Mr. Hill was going to attempt to secure an FHA loan?

A. I don't remember the date, no.

Q. Do you have any recollection of how you received that word? A. No, I don't.

Q. Do you know what month it was?

A. No, not other than from the application for a loan or a commitment.

Q. Well, of course, there must have been some preliminary discussions prior to the date that is on it? A. Yes, should have been.

Q. Sure—(Interrupted)

A. But I don't remember any dates, no.

Q. You don't recall now how long before this application was dated that you had any such agreement?

A. No, I don't. It could have been one week. It could have been two weeks. Might have been longer than that as far as I know.

Q. Mr. Waxberg, what days did you work on this project? [261] A. What days?

Q. Yes, days.

A. I don't remember. I can't remember that.

Q. Well, do you have any present recollection of how did you arrive at the forty-three days?

A. Well, it was time that I spent in Seattle mostly and some of the time here getting the Williams Equipment for the drilling and spending some

(Testimony of A. E. Waxberg.)

time with Philleo. I distinctly recall getting Philleo out on Sunday. He was reluctant in working but we had to have it so Philleo had his men working on Sunday. I can well remember that.

Q. Now then, the time that you spent in Seattle, is that represented by the hotel bills?

A. I imagine so. The time also, the trip to Juneau was spent.

Q. That was a part of the Seattle business?

A. That was part of it, yes.

Q. So then from the Munson Motor Court we have a receipt for January 29th to February 1st, that is 29th and 30th, 31st and 1st, four days?

A. Yes.

Q. March the 8th to 15th is seven days at the New Washington eleven days, March the 1st and 2nd at the New Washington?

A. I believe you had better look at that again. I believe it says from March the 2nd dash 27th.

Q. Oh, you are right. I'm sorry. These are hooked right up against each other then, aren't they?

A. Practically, yes.

Q. First to the 7th and the 8th to the 15th.

A. This is the original you see, and this is a copy, because I didn't have all of it.

Q. This is a duplicate statement?

A. A duplicate, I mean.

Q. So there is fifteen and four is nineteen days. I thought we had another hotel bill. Here it is, 4th, 5th, 6th and 7th.

A. Umm-umm.

(Testimony of A. E. Waxberg.)

Q. Four days at the Gowman and our little Juneau trip, that was just one day?

A. I think that was just two days.

Q. Two days?

A. One day going in, stayed there one night, I believe.

Q. Two days. A. Was it two days.

Q. Twenty-second to 24th. Now then, was Mr. Hill present in Seattle at the time all of the time that you were there during these trips?

A. I believe so.

Q. Now then, that leaves us some place short of forty-three days. How many days did, did you stay down there with the [263] Williams Equipment people at the time that they were doing that drilling?

A. Well, no, but I was looking after it and I was no doubt figuring on this work, too.

Q. You were what, Al?

A. Figuring on helping them and telling them where to drill, making out the papers so I might have spent a day or two on that.

Q. There was just one day that they drilled, wasn't there?

A. Well, that I don't remember. It was one day moving in and drilling. There was only one corner that we were concerned about that we could possibly drill in. I guess it was about that. I don't remember. One or two days. I don't remember.

Q. Does this bill that Williams Equipment Company sent you, does that represent all of the drilling

(Testimony of A. E. Waxberg.)

that Williams Equipment Company did down there?

A. I imagine so. Drilling and thawing. The ground was frozen. It was quite an operation.

Q. Do you believe this bill to be accurate?

A. I have no reason to believe that it isn't.

Q. They drilled three holes twenty-two feet deep each. How big was this building?

A. What building?

Q. The one to be constructed, the one here fronting on Second, First and Lacey?

A. It covered the entire block. [264]

Q. Do you believe that you could anticipate the ground under the entirety of the building as represented by these preliminary plans by only three twenty-two foot holes?

A. I'm glad you asked me that question because I have been living here for eighteen years and I have done a lot of work around here. I saw the Greimann Building, the basement dug there. I observed the footing there and I put in the footing for the Lacey Street Theater and I called it to Mr. Hill's attention that it would be advisable to drill this particular corner because I noticed in the corner of First and Lacey on the Lacey Street Theater we run into some very bad ground. Otherwise the footing would only have to go down about four or five feet, six feet at the most, but I anticipated a deep footing there and for that reason I called it to his attention to have it drilled.

Q. Now then, you think that this is all the drilling necessary though to prepare the plans, make

(Testimony of A. E. Waxberg.)

the drawings for a building for all of the footings for that entire building?

A. With what previous knowledge I had of the ground and surrounding ground why there was only one thing in question that would be pertinent to size of footings required and so forth.

Q. Mr. Waxberg, you didn't answer my question. Would the architect, would any architect have designed the footings for a building this size and in Fairbanks on the basis of drilling in the corner of First and Lacey?

A. He would have to get some knowledge. If there was no [265] one there to tell him what the surrounding ground was he would certainly have to drill. He would have to drill more.

Q. Do you know the condition of the ground for instance at the corner of First and Lacey?

A. Within twenty feet, yes.

Q. What do you mean, within twenty feet?

A. Well, across the street.

Q. Do you know what the back, the depth of this building as it runs east and west on Second?

A. I don't know, it is probably fifty, seventy feet, something like that as I recall it.

Q. This, you don't believe that this three holes twenty-two feet long is sufficient information upon which to design the footings for a building the size of this?

A. Under the circumstances for a preliminary drawing.

Q. I know that, Al. That is not what I am asking

(Testimony of A. E. Waxberg.)

you. I am asking, I am talking about the drawings, the specifications, not the specifications but the detailed plans of the footings.

A. Oh, I suppose not when you come right down to the final.

Q. Not when you start to prepare the final plans for the things?

A. Then you would possibly have to drill more holes.

Q. Sure. Mr. Waxberg, to your knowledge were there more plans and specifications prepared for this building by Chiarelli and Kirk than are represented by the ones that are here now? [266]

A. I don't remember. I know they were working on it straight through as long as I was there but whether there was any of them completed, I doubt very much.

Q. At the time that you were in Seattle and with Mr. Hill, I believed you testified now that Mr. Hill was present in Seattle all of the time that you were represented there as represented by your hotel bills?

A. As I recall it, yes. Might be one time that he wasn't there. He might have been up here. I was down there.

Q. Did you at any time while you were down there with Mr. Hill ever ask him to pay your hotel bill?

A. No, I didn't.

Q. Or to pay your airplane fare?

A. No, I didn't.

Q. Or your meals?

A. Nope.

Q. Did you ever ask him for any money?

(Testimony of A. E. Waxberg.)

A. No.

Q. Did you expect or intend at the time you were down there or while you were here working on this thing to charge Mr. Hill for that work?

Mr. Hepp: I object to that question as repetitious. The matter has been gone into. We will be here until next month.

The Court: He may answer.

Mr. Waxberg: Ask that question again, please.

Q. (By Mr. McNabb): I say, at the time that you were working on this project did you intend to charge Mr. Hill for that work?

A. Well, not with the mutual agreement that we had, if the commitment was to go through, if the commitment went through I was to build the building and I had no intentions to be, I never even dreamed of getting kicked out of the deal. That is the bad part of it. If I had ever thought of that I would have had a written contract before we started, before I ever spent five minutes on it I would have had a written contract.

Q. Well, every time then for instance did you not spend some money on the Nenana School job prior to the time that you got the bid?

Mr. Hepp: Now, I object to that, your Honor. That is a contract price where an invitation to bid is set out and competitive bidding is made. This is not a comparable situation. That doesn't tend to settle any of the issues before this court. I object to it.

The Court: Objection sustained.

(Testimony of A. E. Waxberg.)

Q. (By Mr. McNabb): You did not though intend to charge Mr. Hill for the work which you did for—(Interrupted)

Mr. Hepp: I object to that as repetitious. He has answered it just two questions back.

The Court: It is repetitious but I am going to let him answer it. [268]

Mr. Waxberg: I have answered it. Already answered that same question just a minute or two.

Q. (By Mr. McNabb): Well, how did you answer it?

The Court: It is true that you have been asked that and you have answered it but I am permitting you to answer it again.

Mr. Waxberg: You are permitting me to answer it again?

The Court: Yes.

Mr. Waxberg: I had no intentions of charging him for this work because I figured that I was going to be the builder on, it was an agreement that I was to be the builder on this providing we get this FHA loan and I certainly would not have spent five minutes on it if I thought he would break his word and kick me out on the deal.

Mr. McNabb: You may cross examine.

Mr. McNealy: If the Court please, I don't know if we will have any questions to ask of Mr. Waxberg. There is a matter some of the attorneys and the Court are interested in and I dislike, your Honor, to make such a motion at this time but I

(Testimony of A. E. Waxberg.)

would like to move for a recess until ten o'clock tomorrow morning?

The Court: The defendants have any objections? McNabb any objections to a continuance to ten o'clock tomorrow morning?

Mr. McNabb: Certainly not, your Honor. I would like to be heard a couple of minutes after the Court excuses the jury, if I may, please. [269]

The Court: Members of the jury, there are special and valid reasons for permitting the Court to take, to terminate early today, one of them being that there is a lawyers' picnic in progress. I don't suppose we are supposed to have held Court at all this afternoon, but we have accomplished something and I will excuse you until ten o'clock tomorrow morning, but I admonish you again not to discuss the subject matter of this trial among yourselves, or with anyone; and do not express any opinion until the case is finally submitted to you. You are excused until ten o'clock tomorrow and I wish Mr. Erickson, if you will approach the bench on the way out. If you will just come up and see me on your way out, Mr. Erickson. You may step down there, Mr. Waxberg.

(Thereupon, the jury withdrew from the courtroom and the following proceedings were had out of the presence and hearing of the jury):

Mr. McNabb: If it please the Court, again I would like to move the Court for a directed verdict now on the third amended complaint. This sounding

in quantum meruit and it being the testimony of the plaintiff that at the time the services were rendered that he did not intend to be paid for them, did not expect to be paid for them, had no intention of making a charge for them; that any money that he received for them was to be the result of his profit from the building and quantum meruit is not founded on that sort of, at least our impression that that is not the concept of quantum meruit.

The Court: Mr. McNabb, I believe the case is in the same state of affairs that it was so far as testimony is concerned as it was when this matter was previously argued and the Court has no quarrel with any of the authorities cited this forenoon, but I don't believe that they are applicable to this situation. This is not in accordance with the authorities cited by you in my opinion. I am going to state to counsel there is no juror present that I am still somewhat perturbed about the matter, but it seems to me that this man, he didn't render services, Mr. McNabb, according to the testimony, with no expectation of compensation. He didn't expect or have any agreement for dollars and cents payment by the Hills to him, but he expected something in return for his services under his theory and what he expected in return was a contract and that is the thing of value and not money that he did expect. That is the Court's theory at this time and I will deny the motion at this time. Adjourn until ten o'clock tomorrow morning.

Clerk of Court: Court is adjourned until ten o'clock tomorrow morning.

(Thereupon, at 4:00 p.m., the trial of this cause was adjourned until 10:00 a.m., August 4, 1955.)

Be It Remembered, that the trial of this cause was resumed at 10:00 a.m., August 4, 1955, plaintiff and defendant both represented by counsel, the Honorable Vernon D. Forbes, District Judge, presiding: [271]

Clerk of Court: Court is now in session.

The Court: You may proceed with the polling of the jury.

(Thereupon, the Clerk of Court proceeded to call the roll of the jury.)

Clerk of Court: They are all present, your Honor.

The Court: Parties ready to proceed?

Mr. Hepp: We are ready, your Honor.

Mr. McNabb: Defendants are ready.

The Court: Very well, proceed.

Mr. McNabb: Call Mr. Hill, please.

RUDELL P. HILL

one of the defendants, called as a witness in his own behalf, was duly sworn and testified as follows:

Direct Examination

Q. (By Mr. McNabb): Would you state your name please? A. Rudell P. Hill.

Q. Where do you reside, Mr. Hill?

A. In Fairbanks.

Q. How long have you been a resident of Alaska? A. Fifteen years.

(Testimony of Rudell P. Hill.)

Q. Are you acquainted with Mr. Waxberg?

A. I am.

Q. When did you make his acquaintance?

A. Personally, I believe in 1949. [272]

Q. Do you have any recollection of the circumstances that caused your first meeting?

A. Mr. Orsini introduced me to him.

Q. When did that meeting take place?

A. In December, 1949.

Q. Do you recall the part of the month?

A. It would be early part of the month.

Q. Where did the meeting take place?

A. Mr. Orsini's office.

Q. Who was present that time?

A. Mr. Orsini, Mr. Waxberg, and myself.

Q. Was the meeting by a pre-arrangement?

A. Yes.

Q. At whose arrangement?

A. Mr. Orsini's.

Q. For what purpose was the meeting called?

A. To see if I would approve of Mr. Waxberg being a contractor for me.

Q. I'm sorry. I didn't understand you.

A. To see if Mr. Waxberg would be suitable to me as a builder in a projected building.

Q. You were at that time proposing to construct a building? A. I was, yes, sir.

Q. What type of a building?

A. A three-story commercial building, office space and commercial on the street floor. [273]

Q. Had you at that time any plans for such a

(Testimony of Rudell P. Hill.)

building, any actual plans prepared by an architect?

A. I am not sure whether I had those plans at that date or a few days later.

Q. Where was that building to be located?

A. Between First and Second on the, on the other side of Lacey.

Q. That is the east side of Lacey Street?

A. Yes.

Q. Was it to extend the entire distance from First to Second? A. Yes.

Q. And front on what streets?

A. First and Second and Lacey Street.

Q. What was Mr., or what was Mr. Orsini's interest in that building, if any?

A. He had approached me for a location in that building and had offered me advanced rental on that location to help finance it.

Q. Where did he want a location?

A. On the corner of Second and Lacey.

Q. Do you know the purpose for which he wished it?

A. I was told at the time that it was for a bank.

Q. Why did he arrange this meeting with Mr. Waxberg?

Mr. Hepp: Now, I object to that unless it is within [274] the knowledge of this witness why another man did something.

The Court: Sustained.

Q. (By Mr. McNabb): Do you know why he arranged a meeting with you with Mr. Waxberg?

(Testimony of Rudell P. Hill.)

Mr. Hepp: Yes or no.

Mr. Hill: I partly no. I don't know the full story.

Q. (By Mr. McNabb): Well, what do you know about it?

Mr. Hepp: I object to that unless the foundation is laid how he would know and whether or not it is hearsay within the knowledge of this witness.

The Court: The answer might result in some damage. I will sustain the objection.

Q. (By Mr. McNabb): You knew previously, that is prior to this meeting that Mr. Orsini was to arrange a meeting with you and Mr. Waxberg?

A. I did.

Q. Did he tell you why he wanted to have the meeting?

Mr. Hepp: I object to that. There is nothing in any conversation like that that would bind the plaintiff in this cause, not within the issues before this Court; purely hearsay as to what somebody else thought they were going to do; why they said they were going to do something.

The Court: I will permit the answer. [275]

Mr. Hill: Could I have the question again, please.

(Thereupon, the reporter read the question.)

Mr. Hill: Because he had suggested Mr. Waxberg as the contractor.

Q. (By Mr. McNabb): Was Mr. Orsini an employee of yours at that time? A. No.

Q. Did you have the meeting? A. Yes.

(Testimony of Rudell P. Hill.)

Q. What was discussed at that meeting, Mr. Hill?

A. The possibility of building as we had planned at that time.

Q. Was there any discussion concerning financing that building?

A. It was planned at that time, I don't remember the exact discussion but it was planned at that time to finance it under RFC, Reconstruction Finance Corporation.

Q. Is that a governmental agency?

A. Yes.

Q. What was the extent of the discussion between you and Mr. Waxberg at that time concerning the construction of the building?

A. Merely if he would be interested in the contract to build it.

Q. Did you make that inquiry of him?

A. Yes. [276]

Q. What was his reply?

A. Very much interested.

Q. Did you have any subsequent meeting with Mr. Waxberg during the month of December in that regard?

A. I don't remember.

Q. Were you in Fairbanks during the entirety of the month of December?

A. No.

Q. Where were you?

A. In San Diego.

Q. When did you go to San Diego?

A. Approximately, I don't remember the exact date now. Approximately about the 15th.

Q. Of December?

A. Yes.

(Testimony of Rudell P. Hill.)

Q. Did you make any inquiry while you were away from Fairbanks concerning the construction of a building as you have discussed it?

A. Yes.

Q. And with whom did you discuss it?

A. After the holidays, after the first of the year we came back to Seattle, my wife and I. At that time we went to the RFC office, the National Bank of Commerce and other places to find out if our project was possible or feasible.

Q. And what did you discover? [277]

A. We discovered that for certain reasons that the RFC financing was not feasible for us. One was that they lent a much smaller proportion of the cost of the building than did FHA. The other was that they planned a ten-year repayment instead of a thirty-year, which was possible under FHA.

Q. What did you do then as regards continued efforts to secure RFC financing? A. Nothing.

Q. Did you proceed on a new course then?

A. I did.

Q. What did you do?

A. We arranged with architects and planned an apartment building instead of an office building under FHA.

Q. Did you have any discussions or any correspondence or communications with Mr. Waxberg as regards a different type building than the one which was originally discussed?

A. That is quite probable. I don't remember specific conversations, sir.

(Testimony of Rudell P. Hill.)

Q. How did you proceed, Mr. Hill, in reference to the construction of an apartment building?

A. The National Bank of Commerce, I will have to explain something of the procedure in those cases. Those applications must go in through a bank. The National Bank of Commerce referred us to Mr. Sumter as a man capable of helping us prepare an application which they would see fit to send in.

Q. Which the bank would see fit to send in?

A. Yes.

Q. Did you go to Mr. Sumter? A. I did.

Q. What did he do, Mr. Hill?

A. He discussed the proposition and the probabilities, told us what equities we would have to produce, what was needed on our part and what was needed on the architects' part, what plans and exhibits would have to be submitted for the insurance for the loan.

Q. And after that discussion with Mr. Sumter, what did you do?

A. I immediately proceeded to supply him with information enough so that he could prepare the application.

Q. Was the application prepared?

A. Yes.

Q. I will show you the Defendant's Identification B and ask you if you know what that is?

A. That is the application that was prepared at that time or after that time, yes.

Q. By whom was this prepared?

A. It was prepared by Mr. Sumter, submitted to

(Testimony of Rudell P. Hill.)

the National Bank of Commerce who submitted it to Juneau through Mr. Sumter.

Q. Now, on the Defendant's Identification B there is a list of exhibits, were those submitted with the application? A. They were. [279]

Q. Now, at the time that this application was submitted or prior to the time that it was submitted, had you had any discussions with Mr. Waxberg? A. Yes.

Q. At what place were the discussions carried on, in Fairbanks?

A. No, I don't believe so.

Q. Well, were the discussions in Seattle?

A. I think so.

Q. Who prepared the legal description which is a list of exhibits? A. Mr. Philleo.

Q. Who employed him? A. I did.

Q. Do you know whether he was ever paid?

A. I paid him.

Q. Do you know who prepared the letter re ownership?

A. I believe Mr. Sumter prepared that.

Q. Who secured the letter re zoning?

A. I did from the city along with zoning maps from the city.

Q. There were photographs submitted. Do you know who secured them?

A. I furnished some from my files. They were photographs of my own property.

Q. Who secured the city map? [280]

A. I did through the City Clerk or the City

(Testimony of Rudell P. Hill.)

Manager, I have forgotten which now. It was from a city officer.

Q. Are you familiar with FH 21A Department of Labor form? A. Yes.

Q. Do you know who prepared that?

A. Mr. Sumter.

Q. Did you submit a personal financial statement? A. I did.

Q. Who prepared that?

A. Bohlet and Kohler.

Q. Are you familiar with Form FHA 2013E?

A. I am not from the number, no.

Q. Now, under the architectural exhibits, do you know who prepared the topographical survey?

A. Mr. Philleo.

Q. Do you know who prepared the preliminary papers, the architectural exhibits?

A. Chiarella and Kirk.

Q. Who employed them? A. I did.

Q. They prepared also outline specifications?

A. I believe the outline specifications was either in their office or Mr. Sumter's office, I not sure which office prepared those.

Q. And the trade payment break-down? [281]

A. That I don't know which, who prepared that.

Q. Now, you signed this application for mortgage insurance, didn't you? A. I did.

Q. As a sponsor on here we find the name of A. E. Waxberg Construction Company. You knew at the time you signed this that his name was on there? A. Yes.

(Testimony of Rudell P. Hill.)

Mr. Hepp: I object to leading questions.

The Court: Yes, counsel, I think you can ask the witness if he knows. Let him answer the question.

Q. (By Mr. McNabb): Do you know why Mr. Waxberg's name appears on the application?

A. Yes.

Q. Why did his name appear there?

A. In order to answer that question, if I am permitted to do so, I will have to go into some of the, you might say technicalities and figures and the methods of FHA as they were presented to me and I learned later that was so.

Q. What are they, Mr. Hill?

Mr. Hepp: Now, just a moment. I am unable to object to offers as they come out in a rambling conversation form or narrative form. I believe counsel should attempt by offers to give me, so that I am able to lodge an objection and to protect [282] the plaintiff in this cause.

The Court: I think I will permit the witness to answer the question why the name of Mr. Waxberg appears as a sponsor.

Mr. Hill: I have offered to review some of Mr. Waxberg's and Mr. Sumter's evidence at this time to explain my answer.

Mr. McNabb: The Court has ruled that you may answer the question.

Mr. Hill: Under the situation the FHA would insure for a certain amount. We had to show an equity of at least ten percent of that amount. There was a certain amount left for the contractor to con-

(Testimony of Rudell P. Hill.)

struct the building for his fees and construction costs or a lump sum contract. The contractor would receive a certain amount either way, it could be broken down into fees and remained into the building costs or it could all go together into the same amount as a lump sum contract. But, by his name being on there as co-sponsor and agreeing to leave forty-five thousand in there had the effect of building our equity with FHA. It left his contract price the same except that I would owe him forty-five thousand dollars that I had to produce later and pay him. It was really a forty-five thousand dollar advantage to Mr. Waxberg.

Q. (By Mr. McNabb): Is that the reason, Mr. Hill, that Mr. Waxberg is shown on here as other equity in the amount of forty-five thousand dollars?

A. Yes.

Q. And on the application I believe the forty-five thousand is labeled for a particular purpose?

A. I don't understand it.

Q. Well, it is explained here, is it not, on the exhibit?

A. For builders, no, it is forty-five thousand dollars of his builder's fee to be left there as his equity.

Q. And that was to increase your equity?

A. It would increase my equity. It would not effect his, the money that he received for doing the job, but it would cause the effect of I owed Mr. Waxberg forty-five thousand dollars to increase the equity in the building because later I would have

(Testimony of Rudell P. Hill.)

to pay Mr. Waxberg forty-five thousand dollars. In the meantime I would, I had the use of that forty-five thousand dollars to increase my equity.

Q. Now, the forty-five thousand dollars would not have been subtracted at all from Mr. Waxberg's fee for constructing the building? A. No.

Mr. Hepp: Now, I object to a leading question like that. I think the witness can state what that forty-five thousand dollars was.

The Court: Yes, I think that counsel is leading the witness excessively.

Mr. Hepp: I believe the witness answered the question. I ask that it be stricken. [284]

The Court: It will be stricken.

Q. (By Mr. McNabb): Would the contractor in a case of this kind, Mr. Hill, be paid the amount of his equity as represented on the application?

A. In this particular case he would. That doesn't signify that he would. It signifies that he would retain a forty-five thousand dollar interest in the building, or forty-five thousand dollars worth of stock in the corporation which was agreed between Mr. Waxberg and I that I was to purchase from him later.

Q. Was Mr. Waxberg interested at that time in an interest as such in a building?

A. No, he was interested in his fees for building and the profit of building.

Q. Was Mr. Waxberg aware at the time the application was filed of this, that is that his name was to appear as a co-sponsor?

(Testimony of Rudell P. Hill.)

A. That I do not know.

Q. Had you and he an agreement at that time as regards that forty-five thousand dollars?

A. That his equity would be bought by me later, yes.

Q. When was this application filed, Mr. Hill, if it was filed?

A. On or about February 4th, 1950.

Q. And where was it filed? A. In Juneau.

Q. Was the, was a commitment issued on the basis of this application? [285] A. It was.

Q. Did you have any discussions or any meetings with Mr. Waxberg between the date upon which the application was filed and the date upon which the commitment was issued?

A. I may have met Mr. Waxberg. It was, at that stage it was waiting period which nothing could be done until we were assured of that much. We couldn't invest any more money. We couldn't go ahead and do anything else until we waited and that commitment was processed and could be issued.

Q. Was there anything to be done at that time?

A. In connection with this, no, it was a waiting type of period.

Q. Did you have any funds other than the moneys which you were attempting to secure from the government with which to build a building?

A. No, I was borrowing and everything else to pay fees and pay architects for preliminary work

(Testimony of Rudell P. Hill.)

and carry it on to such stage as we could get government funds.

Q. Now, I will show you Defendant's Identification C and ask you if you know what that is, please?

A. That is the commitment for insurance.

Q. Now at this time, at the time that the commitment was issued to what extent had plans and specifications for a building been completed?

A. Just a very minimum of preliminary plans, what was [286] necessary to secure the commitment. We could not contract for an eighty or ninety thousand dollar architectural job to proceed any further and make ourselves liable for that money to pay those architects until we were assured of money to pay it.

Q. Mr. Hill, this is Defendant's Identification A. Do you know what this is?

A. Those are the preliminary plans as prepared by Chiarelli and Kirk to be offered as an exhibit at Juneau for the, with the application.

Q. And were they submitted?

A. Yes. I believe Mr. Sumter testified that one page was later delivered. There was one page short, that one delivered later.

Q. Mr. Hill, where was this building to be located?

A. The same location as I described for our idea of an office building under RFC between First and Second on Lacey Street.

(Testimony of Rudell P. Hill.)

Q. Now then, after the commitment was issued did you have any discussions with Mr. Waxberg?

A. I did, on two occasions.

Q. And where was the, do you know when the first of those meetings was held?

A. The exact date I am not sure of. The commitment as it stands in evidence was issued late in February. It was a few days after that when the commitment was in our hands we met [287] to consolidate all our former plans, get a contract price and really and seriously get down to work.

Q. Where did that meeting take place?

A. In the New Washington Hotel.

Q. Who was present there?

A. Mr. Waxberg, Mr. Orsini and myself and my wife.

Q. Do you know why Mr. Waxberg, or why Mr. Orsini was present?

A. Other than his interest in renting space he was there as Mr. Waxberg's adviser.

Q. At that time was he employed by you?

A. No.

Q. As regards the construction of this building or the plans had he ever been employed by you?

A. Not employed by me. He had been interested in the plans with sufficient space and the right space was provided for him that he was to advance rent on.

Q. Who arranged that meeting, Mr. Hill?

A. I don't recall. It was arranged after the

(Testimony of Rudell P. Hill.)

commitment for all of us to get together and get ready to go ahead on this thing.

Q. Now, what did you discuss at that meeting?

A. We discussed the amount of money made available under the commitment and what could be done with it.

Q. Mr. Hill, does the commitment for insurance, that is Defendant's Identification C, specify the amount of money that [288] the government was willing to insure? A. It does.

Q. And what is that amount?

A. One million six hundred ninety-four thousand two hundred dollars. I am putting that from memory. I haven't found it on the commitment. Oh, yes, it is on the front page and I have quoted it correctly.

Q. Now, Mr. Hill, was that amount of money available to the contractor for the construction of the building? A. It was not.

Q. How much money was available or what, let me ask you this, was there of necessity deductions to be made from that amount which would not have been available for the construction of the building?

A. There was.

Q. What are those deductions?

A. One were financing fees and such which the FHA retained. They never came into our hands.

Q. Is that amount of money indicated on any official form?

A. Yes, it is, it is indicated on, I am trying to think of the official word for the form. That is one

(Testimony of Rudell P. Hill.)

of their forms that are filled out by the FHA office. It is a project analysis.

Q. I will show you again, Mr. Hill, the Defendant's Identification B which is the application for insurance. There is, under carrying charges and financing a breakdown. What is that?

A. That is a list of the charges and which they retain. [289]

Q. Now, Mr. Hill, I will show you Plaintiff's Identification G, ask you if you know what that is?

A. That is the project analysis and I believe that I was in error on which paper these figures were. Well, they were on both papers.

Q. Does that, who prepares the project analysis?

A. It is signed by the FHA evaluator. I believe it is prepared in the FHA office.

Q. Does that indicate the amount of money that would of necessity be deducted from the commitment? A. Yes.

Q. What are those deductions, Mr. Hill?

A. Interest for eighteen months at four percent; real estate taxes; insurance; for fire, wind, storm and liability; FHA insurance premium; FHA examination fee; and a financing expense of one and a half percent, coming to a total of one hundred thirteen thousand two hundred sixty-four dollars.

Q. So then the figure of a million six hundred ninety-four thousand two hundred dollars would have been reduced in the amount of a hundred thirteen thousand, is that right? A. Yes.

Q. Were there any deductions?

(Testimony of Rudell P. Hill.)

A. Yes, the architect's fee.

Q. And what was the amount of that?

A. In, it would be in the amount of eighty thousand one hundred nineteen dollars. [290]

Q. Total of that is about two hundred thousand?

A. Approximately. I haven't figured it. I haven't had the notes on it.

Q. Now then, how much would then have been available to construct the building?

A. The commitment price less those which as my memory serves me, I haven't had the figures, would be in the neighborhood of a half a million, five hundred thousand.

Q. At any rate, that is a simple matter of mathematics, isn't it?

A. Yes.

Q. Did you discuss that matter with Mr. Waxberg in the New Washington Hotel?

A. I did.

Q. What was the extent of your conversation in that regard?

A. That that was all the money there was available for a contract was a million five hundred.

Q. What did he say in that regard?

A. That the commitment was for a million six hundred ninety-four thousand and he demanded that amount for the contract.

Q. Mr. Hill, could you possibly have given him that amount of money?

A. I know of no way in which I could have

(Testimony of Rudell P. Hill.)

raised the amount of money to give him that amount.

Q. It was not available from the loan, was it?

A. No. [291]

Q. Did you ever agree to give him that amount of money? A. No.

Q. What did Mr. Waxberg say then?

A. He said that he could not build and could not enter into a contract for anything less than the full commitment price.

Q. Did he make you at that time any counter-proposals?

A. I wouldn't call it a counter-proposal. There was more to his proposal.

Q. What did he say?

A. That if I would issue him fifty-one percent of the stock in the corporation, give Mr. Orsini the management contract then that he could sell stock and some of the remaining stock to raise this money.

Q. On that condition he would build the building?

A. On that condition he would build the building.

Q. Was that proposal acceptable to you, Mr. Hill?

A. No. May I enlarge on that?

Q. Why, why was it not?

A. We had, my wife and I our life savings, everything we owned invested in this, the very land that our present buildings are on was involved

(Testimony of Rudell P. Hill.)

in this. Everything that we had or could borrow was involved in the situation. They were offering us an undetermined amount of stock, whatever was left after they had sold off part of the forty-nine percent left to us to raise two hundred thousand dollars as our equity in the project.

Q. That would have left you virtually nothing?

A. Practically. Possibly nothing. Possibly a small equity in the buiding.

Q. Did you refuse that offer?

A. I told him that I could not if I wanted to, go that far because it would leave my wife and I with our life's work as of nothing.

Q. What did Mr. Waxberg say?

A. That he was standing pat, that was his last proposition.

Q. Did Mr. Waxberg also want Mr. Orsini to have a contract?

Mr. Hepp: I object to leading questions like that, suggests the answer to this witness.

Q. (By Mr. McNabb): Was a contract for Mr. Orsini a part of Mr. Waxberg's proposal to you?

Mr. Hepp: Same objection.

The Court: Sustained.

Q. (By Mr. McNabb): Well, now, Mr. Hill, in addition to his demand for the stock and the entire commitment price, did Mr. Waxberg insist on any other conditions? A. Yes.

Q. What was the other condition?

A. That Mr. Orsini get a management contract.

Q. Was that acceptable to you? A. No.

(Testimony of Rudell P. Hill.)

Q. On what note did the conversation terminate that day? [293]

A. Rather bitter.

Q. What was done to terminate the conversation?

A. Mr. Orsini went out and left us in a huff. We asked Mr. Waxberg when he was alone away from Mr. Orsini if he was standing on that, if he was going along with Mr. Orsini on such a demand. Yes, he was, that was the story, that must be the way it was. It had to be that way or nothing.

Q. Were you able to reach an agreement at all that day? A. No.

Q. Did you have any other conversation with Mr. Waxberg? A. Yes.

Q. When did they occur?

A. A few days later, I don't remember the exact date.

Q. Where did the conversation take place?

A. In the office of Mr. Kellog, an attorney with the firm of Bogle, Bogle and Gates in Seattle.

Q. By whom was he employed?

A. The attorney?

Q. Yes. A. By me.

Q. Who was present that week?

A. Mr. Waxberg, my wife and myself and Mr. Kellog.

Q. Do you know who called that meeting?

A. I did.

Q. Why did you do that? [294]

A. To try to iron out differences to get some

(Testimony of Rudell P. Hill.)

logical, some possible basis for a contract, to go ahead with our project which I had my money invested in.

Q. Did the conversation take place?

A. Yes.

Q. Who was there?

A. Mr. Orsini, Mr. Kellog, my wife and myself.

Q. Was Mr. Orsini there? A. No.

Q. Well, who was present at that meeting?

A. I have listed the four that were present at that meeting.

Q. And who are they?

A. Mr. Waxberg, Mr. Kellog, my wife and myself.

Q. Now, what did you discuss there, Mr. Hill?

A. The finances and the possibility of building, the possibility of getting together on a contract on which we could go ahead.

Q. Did you discuss figures that day?

A. We did.

Q. Were there any notes made at that meeting?

A. There were.

Q. Who made notes?

A. I believe we all made notes.

Q. Now, I will show you the Defendant's Identification E and ask you what that is, please? [295]

A. Those are the notes, the figures that Mr. Waxberg was using at that meeting. Those are Mr. Waxberg's figures.

Q. Is that in Mr. Waxberg's hand?

(Testimony of Rudell P. Hill.)

A. Yes, the figures are, yes. The notations on there are not as we—(Interrupted)

Q. Were they made in your presence?

A. They were.

Q. And at the meeting that you are discussing?

A. They were.

Q. Now, Mr. Hill, will you explain those figures?

A. To the best of my ability these were figures—
(Interrupted)

Mr. Hepp: Excuse me just a moment. Before we, before any evidence is allowed as to what that paper contains, I believe it should be in evidence before it is read to the jury and I am going to object because there are writings on that that are not in the handwriting of the defendant or the plaintiff. They are not his figures or his writing according to this witness. I object to it or any evidence given concerning it.

The Court: The Court sustains the objection.

Mr. McNabb: On what grounds, your Honor?

The Court: That if we are to permit this witness to testify as to what is in the exhibit there would be no object in offering the exhibit in evidence.

Mr. McNabb: I will move to admit it, your Honor. [296]

Mr. Hepp: I lodge my objection according to this witness there are writings there and symbols that are not a product of the plaintiff in this cause. He has nothing to do with it. He has testified that the figures are in the handwriting of this man but

(Testimony of Rudell P. Hill.)

that the other thoughts and figures are not his. I object to that.

The Court: I feel that the figures have been properly explained but I couldn't permit the exhibit to go in without further foundation or explanation as to the writing, so I will deny the offer at this time.

Q. (By Mr. McNabb): Mr. Hill, do you know what the writing on here is?

A. There are notes that Mr. Kellog put on there as we tried to identify or tried to get Mr. Waxberg's way of thinking into our head. Still trying to reach some basis of an understanding.

Q. You are familiar with the figures here to the extent of knowing what they represent, are you not?

A. Most of them I am. Some of them I don't know the meaning of.

Q. You were at the time familiar with them?

A. Yes, I believe I was. I think that I, now, that is again a question. I was not reading Mr. Waxberg's mind as he wrote those figures. I believe I know what they represent. I am familiar with most of the figures, yes.

Q. Now, there are on this Identification some writing which [297] perhaps may be in the nature of explanation. Are those notations erroneous?

Mr. Hepp: Now, I object to that. It is a leading question. He states that Mr. Kellog put those notations on. It is certainly not the best evidence of what they indicate or mean; whether or not they are erroneous has no bearing on this issue. I object

(Testimony of Rudell P. Hill.)

to any further questions on that other writing of this witness.

The Court: The objection is sustained as to the form of the question as calling for a conclusion of the witness.

Q. (By Mr. McNabb): Do you know, Mr. Hill, whether the labels as they appear there or the words as they are applied to the figures are correct or incorrect?

Mr. Hepp: Now, I object to that, your Honor, as calling for an opinion of this witness or a conclusion. They are not his writings. Counsel labels them as a label. I don't think that that is in evidence either. They are writings that are foreign to any of the parties here in Court. I object to it.

The Court: Objection is sustained.

Q. (By Mr. McNabb): When were those writings put there, Mr. Hill?

A. Immediately after Mr. Waxberg left Kellog's office.

Q. You are familiar, are you not, with the entire financial proceedings concerning this transaction up to the time that those [298] figures were written?

Mr. Hepp: Just a moment, sir. I object to the form of the question. It is very comprehensive. It is leading, the financial structure, the entire financial structure. He can ask this witness what he knows. I object to it. I believe the witness has answered the question. I ask that it be stricken.

The Court: I will permit the answer to stand.

Q. (By Mr. McNabb): Mr. Hill, as regards the

(Testimony of Rudell P. Hill.)

writing that has been added there, do they correctly identify the figures as you knew them at that time?

Mr. Hepp: Just a moment. I object to that offer, calls for a conclusion. This witness, they are not his writings. I don't think he is qualified to answer that question. I object. It is merely rephrasing of other questions.

The Court: Objection is sustained. May the Court see the exhibit, please. For the defendants' counsel I will state at this time with reference to Plaintiff, Defendant's Identification E, that the Court is satisfied that a sufficient foundation has been laid as to the figures appearing thereon, but the witness has testified that the writing was made thereon after the plaintiff who made the figures left the office. And I certainly don't want to have the writing erased but I cannot permit the identification to be received in evidence with the writing on it under the present state of the record. The writing would not be binding on [299] the plaintiff.

Mr. McNabb: Does the Court feel that we could not erase the writing there or remove the writing from the exhibit.

The Court: Under the situation which has developed the Court will permit counsel to inquire of the witness as to the figures appearing there on which he has identified as being in the plaintiff's handwriting. That is something I precluded before you made the offer.

Q. (By Mr. McNabb): Mr. Hill, do you know the amount of money, the maximum amount of

(Testimony of Rudell P. Hill.)

money that was allowable by the FHA per unit for the construction of an apartment building?

A. Yes.

Q. Did you know it at the time that you had your discussion with Mr. Waxberg in Mr. Kellog's office?

A. I did.

Q. Do you know it now? A. Yes.

Q. What is that amount?

A. That, do you want the total amount or the amount broken down into two parts, one per unit per apartment, plus—(Interrupted)

Q. There are two figures?

A. Plus a percentage allowance for commercial space. The full amount together would be eleven thousand eight hundred eighty dollars per unit including the allowance for commercial space. [300]

Q. Mr. Hill, how many units had you planned?

A. A hundred forty-four.

Q. On that basis are those the figures that are there, eleven thousand eight hundred eighty dollars?

A. It is eleven thousand eight hundred eighty dollars multiplied by a hundred forty-four giving a total of one thousand, or one million seven hundred ten thousand seven hundred twenty dollars.

Q. Was anything like that amount of money granted under the commitment?

A. Not that amount.

Q. Now, let me ask you this, Mr. Hill, did you at any time have any discussions with Mr. Waxberg concerning the retention by you of a part or any part of the commitment price?

A. Yes.

(Testimony of Rudell P. Hill.)

Q. What was the nature of that discussion?

A. Twenty-five thousand and some odd dollars that must be deposited with FHA, the label they gave it was a working capital. I think the purpose of it was to insure that when the contractor finished the building that we were able to clean it up, put it in condition and rent it. That money as I understood it could be either retained by them out of a commitment money or we could deposit it in cash. I had no funds of my own left at that time to furnish it. We discussed various means of getting it and in talking this contract price at first I told him if I could save [301] that much out of the contract price I could borrow it and repay it later if I could show a lender where I could repay it. That was later dropped because of the excessive demands of the contract and I was willing to give him everything that I could possibly give him out of the commitment and not try to retain the twenty-five thousand dollars working capital.

Q. Did you ever discuss with Mr. Waxberg any sum of fifty thousand dollars? A. No.

Q. Mr. Hill, were you willing that Mr. Waxberg should build this building?

A. Yes. I would have preferred a local builder on the building.

Q. Why did he not build it?

A. Because I could not pay the price he asked to build it.

Q. What price did he ask to build it?

(Testimony of Rudell P. Hill.)

A. One million six hundred ninety-four thousand plus some conditions, plus control of it.

Q. How much was available to construct the building?

A. In the neighborhood of a million five hundred thousand.

Mr. McNabb: May we have the recess at this time.

The Court: Very well. Members of the jury, I ask that you heed the previous admonition given to you. We will take a ten minute recess.

Clerk of Court: Court is recessed for ten minutes. [302]

(Thereupon, at 11:00 a.m., the Court took a recess until 11:10 a.m., at which time it reconvened and the trial of this cause was resumed.)

Clerk of Court: Court is now in session.

The Court: Parties wish to stipulate that the twelve members in the box are the jurors duly impaneled and sworn to try this cause?

Mr. Hepp: We will so stipulate.

Mr. McNabb: The defense will stipulate.

The Court: Proceed.

RUDELL P. HILL

the witness on the stand at the time the recess was taken, resumed the stand for further direct examination.

Q. (By Mr. McNabb): Mr. Hill, did you ever request Mr. Waxberg to come to Seattle to meet you? A. No.

(Testimony of Rudell P. Hill.)

Q. Do you know why he went there?

A. He had informed me that he would be very interested in working with the architect to keep costs down. I notified him that preliminary plans were being made, that it was time he was there if he wished to be with the architect.

Q. Do you know whether the property upon which this building was to be constructed was ever drilled? A. Yes.

Q. Did you employ anyone to drill that ground?

A. I did. [303]

Q. Who did you employ? A. Mike Erceg.

Q. Do you recall how much it cost to have the ground drilled?

A. About twenty-five hundred dollars.

Q. Did you pay Mr. Erceg? A. I did.

Q. Do you have evidence of your payment of Mr. Erceg?

A. I have evidence of part of it.

Clerk of Court: Defendant's Identification H.

(Cancelled check made payable to Mike Erceg in the amount of \$634.00 was marked Defendant's Identification H.)

Q. (By Mr. McNabb): Why did you have the ground drilled, Mr. Hill?

A. To supply architect with information for the footings on a building that was later planned and built.

Q. When was such information required by the architect?

(Testimony of Rudell P. Hill.)

A. When the structural engineer went to work for final plans.

Q. Was it necessary prior to that time?

A. No.

Q. Was it necessary prior to the time that Mr. Waxberg was no longer associated with you in this building?

A. No.

Q. I will show you Defendant's Identification H, ask you [304] if you know what that is, please?

A. That is a check on the Second and Lacey Street Apartments made payable to Mike Erceg for Six hundred thirty-four dollars.

Q. Why was that—(Interrupted)

A. It has been cancelled.

Q. Why was that amount paid to Mr. Erceg?

A. For drilling the property.

Clerk of Court: Defendant's Identification I.

(Cancelled check made payable to Mike Erceg in the amount of \$633.75 was marked Defendant's Identification I.)

Q. (By Mr. McNabb): And Identification I, what is that?

A. That is a check the same in all respects except a different date, in the amount of six hundred seventy-three dollars, seventy-five cents.

Q. Does that represent the entirety of the payment you made to Mr. Erceg?

A. It does not.

Q. Do you know how the balance was paid?

A. With my personal checks.

Q. Are they available at this time?

(Testimony of Rudell P. Hill.)

A. They are stored in past records. I haven't been able to dig them out.

Q. Did you employ anyone else to drill any of that property? [305]

A. I did not.

Q. Did you ever see any drill logs of the property other than those prepared by Mike Erceg?

A. I did not.

Q. Did you request the employment of a driller by any person? A. I did not.

Q. Or of any person, rather. Did you ever employ Mr. Orsini in this transaction?

A. I did not.

Q. You say Mr. Orsini was interested in some rental property? A. He was.

Q. Did Mr. Orsini assist in the financing of this project? A. Yes.

Q. To what extent?

A. Five thousand dollars.

Q. What was that to represent?

A. A part payment on advanced rentals that he had agreed to give me.

Q. What advance rental was this?

A. He agreed to give me advance rentals at the rate of ten thousand dollars a year for five years which would amount to fifty thousand dollars.

Q. Was that money ever paid to you?

A. Five thousand dollars. [306]

Q. That was all that was paid to you?

A. Yes.

(Testimony of Rudell P. Hill.)

Q. Was Mr. Waxberg present at the time that this fifty thousand dollars was discussed?

A. I believe so, but I don't know.

Q. Did you ever have a discussion with Mr. Waxberg as regards fifty thousand dollars other than this fifty that you are discussing now?

A. No.

Q. Did you request Mr. Waxberg to go to Juneau with you?

A. I don't remember. We went as a group when the application was presented.

Q. Do you know where Mr. Waxberg went from Juneau?

A. I, yes, he came back to Fairbanks.

Q. Mr. Hill, do you know approximately the approximate amount of money under the commitment as it was issued that would have been actually available to a builder with which to construct that building?

Mr. Hepp: Now, I object to that as repetitious. I am sure he has asked that question three times.

The Court: Sustained. Sustained.

Mr. McNabb: You may cross examine.

Cross Examination

Q. (By Mr. Hepp): Mr. Hill, did you, was there a corporation formed at [307] the outset of this venture of yours in this building project which you have been testifying to?

A. There was a corporation formed during, dur-

(Testimony of Rudell P. Hill.)

ing the progress. Right now I couldn't tell you exactly what date that corporation was formed.

Q. Who were the original incorporators?

A. I believe that, my wife, myself, and Orlo Kellog, an attorney.

Q. Was Mr. Waxberg part of the original corporate charter? A. No.

Q. Know what appear in it?

A. No, that I know of, that I remember.

Q. Your first conversations then with Mr. Waxberg were in December sometime I believe you said, the early part of December? A. Yes.

Q. One or two conversations, three, how many?

A. I am indefinite on that as Mr. Waxberg was. I don't remember but there were conversations.

Q. Then I believe you testified that you had another conversation or two in January sometime?

A. Possibly before I left for outside, yes.

Q. And another conversation after the commitment was issued? A. Yes.

Q. Five or six conversations?

A. Yes in toto. [308]

Q. I believe you testified that it was quite probable though you didn't recall any conversation with Mr. Waxberg about the apartment building as distinguished from the original commercial building that you talked about was planned, is that right? I believe in response to counsel's question did you not testify that your first building was in the nature of a commercial building to be financed by RFC?

A. Yes.

(Testimony of Rudell P. Hill.)

Q. That you had discussed that matter with Mr. Waxberg together with Mr. Orsini and there was some conversation about a bank that Orsini wanted to put into the corner? A. Yes.

Q. Well, I believe shortly after that you talked about a, when you learned that you couldn't get RFC or it wasn't feasible that you then planned an apartment building? A. Yes.

Q. I have in my notes that you answered in response to counsel's question that you do not recall having discussed the apartment building with Mr. Waxberg although it may have been probable that you did?

A. That answer is correct. Your notes are correct.

Q. That answer is correct? A. Umm-umm.

Q. When was the conversation that you and Mr. Waxberg, according to you, that he agreed that he leave forty-five thousand [309] dollars of his builder's fees in the building?

A. I could not at this time give you the date or time of it.

Q. Possibly it would have had to have been in January some time, early part of February?

A. It could not have been in January. Yes, I was thinking of December. It could not have been in December because I wasn't here and we hadn't contemplated an apartment building.

Q. It would have been in January then?

A. It must have been some time in January.

(Testimony of Rudell P. Hill.)

Q. It was before the application was made for a commitment?

A. I believe it must have been.

Q. Well, if this forty-five thousand dollars qualified your financial condition to an acceptable point to FHA then it would have had to have been in the application, is that not right?

A. That is true.

Q. So you must have necessarily discussed it with Mr. Waxberg at some time prior to the application date?

A. Yes.

Q. But the best statement you can make in that regard is that it is just quite probable that you did discuss it. You don't recall that conversation? I don't understand.

A. Five years later, over five years later, I admit that there was possibly a conversation. There must have been a conversation but I do not remember the definite date of that conversation. [310]

Q. Well, I am not asking you for a definite date. I am asking you whether you in fact recall a conversation?

A. No, I do not.

Q. But you can even recall figures that were given at just a slightly later date in a meeting in your attorney's office down there, Mr. Campbell or whatever you say his name was; did you meet in an attorney's office later on?

A. Yes.

Q. Kellog, excuse me.

A. Kellog, yes.

Q. You can remember figures of that meeting though?

A. Because I have dealt with those figures ever

(Testimony of Rudell P. Hill.)

since. I have dealt with the same figures ever since. I am still dealing with them.

Q. Well now, what figures other than the commitment price and the building costs would you have been dealing with in connection with any figures that might have been discussed with Mr. Waxberg and what he you say was demanding of you? Why would you deal with those figures again?

A. Because later we built an apartment under the same set-up, the same number of apartments. We went through the same figures time and time again.

Q. Including the amount Mr. Waxberg had asked? A. The commitment price.

Q. As a builder's fee?

A. The commitment price was the same. [311]

Q. You have testified to other figures?

A. The commitment price would make the other figures exactly the same also.

Q. Mr. Hill, were you present when Mr. Sumter was testifying? A. I was.

Q. Did you hear him make the statement that it would take about a week to ten days to process an application?

A. I don't believe I did. I heard him make a statement it would take a week to ten days to prepare an application, not process it for a commitment.

Q. Did you hear him state that it would have taken you about five minutes to compile the in-

(Testimony of Rudell P. Hill.)

formation that he needed to make an application?

A. Well, it would have taken me about five minutes to give it to him after I had it, yes.

Q. As of the time when the application was submitted, Mr. Hill, just how much money had you invested in this project? You have testified that all your life savings had been in there.

Mr. McNabb: I object to that as having not been testified to.

Mr. Hepp: Your Honor, I distinctly recall him having said that he had no money with which to supplement the commitment figures.

Mr. McNabb: That is entirely correct, and we will admit that. [312]

The Court: Very well, the Court doesn't remember all the testimony. You may proceed.

Q. (By Mr. Hepp): As of the date of the commitment, Mr. Hill, how much money had you invested in this project?

A. Well, I can start to itemize. I possibly will even forget some of those.

Q. Well, would you give us a round figure?

A. A round figure, including purchase of land for the project?

Q. If you purchased it then, did you purchase any land?

A. I purchased options and taken my options upon payments, yes.

Q. Were those options expensive?

A. Yes.

Q. How much did you pay for the option?

(Testimony of Rudell P. Hill.)

A. There were several thousand dollars involved. I don't remember the exact amount now. I could get them from my records.

Q. How much as of the time of the commitment had you paid Mr. Sumter?

A. Mr. Sumter's fees were due only on condition that he get the commitment.

Q. Well, what I am trying to get at, Mr. Hill, maybe I am a little clumsy in my questioning, you are speaking, you have testified that there would be something in round figures of two hundred thousand dollars less the commitment that would be [313] available as a builder's costs and fees together? A. Yes.

Q. Now, would that include the architect?

A. Yes, if the project went ahead. As it was I was out twenty-five hundred to the architect at that time that could be reimbursed.

Q. Let's project this to a point where if that building had gone ahead as according to your original plan in that regard, I think that you stated that Mr. Waxberg had asked you for, I think you said he demanded fifty-one percent of the stock?

A. Yes.

Q. Approximately, does the FHA allow up to six percent as a builder's fee as Mr. Sumter testified?

A. It is on one of these forms. I could check it. I am under the impression that it is five. It possibly is six. There is a builder's fee and an architect's fee set out on one of those forms.

(Testimony of Rudell P. Hill.)

Q. It would be something in the neighborhood of a hundred thousand dollars?

A. In the neighborhood of ninety thousand dollars.

Q. It would be ninety at your figure of five, a little over a hundred at your figure of six, if he did say that?

A. Yes.

Q. Now, what would you have put in that building to equal fifty-one percent if Mr. Waxberg had left his builder's fee in that, forty-five thousand of which—(Interrupted) [314]

Mr. McNabb: Just a minute. I am going to object to that question, has no bearing on the issues of this case whatever.

The Court: I think it has only because it was gone into on direct examination. There is some question whether any of this evidence is admissible but it having been gone into on direct I am going to permit the cross examination.

Mr. Hill: That I wouldn't know because it was no speculation of Mr. Waxberg leaving anything in except forty-five thousand dollars of his builder's fee. That was to be repaid to him later. He was to hold stock for it until such time as I could buy it from him. He had repeatedly said that he had no interest in the building, only in the building contract and if he left money in there I was to repay him at a later date.

Q. (By Mr. Hepp): How do you reconcile that statement with your testimony here that he demanded fifty-one percent of the whole deal and he,

(Testimony of Rudell P. Hill.)

and then you say he repeatedly stated he didn't want any part of it?

A. Prior to that, and when the break-up came he made a demand it was impossible for me to meet.

Q. Had you talked to Mr. Slater as of that time, Mr. Hill? A. Oh, several times.

Q. Concerning this very—(Interrupted)

A. He had asked to be cut in, asked to be allowed to become a contractor. Mr. Slater's reputation of a builder was such that [315] I could not consider him at any time.

Q. Well, now, isn't it a fact, Mr. Hill, that you told Mr. Waxberg that another contractor had offered to cut back fifty thousand dollars?

A. I didn't I believe, yes, that Mr. Slater did offer me anything within reason to give him the consideration. He got no consideration until such time that Mr. Waxberg had definitely withdrawn. If I told him that I told him as a joke because of conditions Mr. Slater was in why and how badly he wanted a contract.

Q. Do you joke about fifty thousand dollar kick-backs, Mr. Hill?

A. Yes, under those conditions it was so far-fetched to me that I joked about it.

Q. Your position is that instead of you demanding fifty thousand dollars he demanded fifty-one percent of the stock?

A. Plus two hundred thousand dollars more than it was possible to pay him.

Q. Well, that leaves me at a further problem?

(Testimony of Rudell P. Hill.)

A. His own evidence will show that he demanded two hundred thousand dollars more than there was to pay him, his own figures.

Q. Mr. Hill, there has been great length at this trial to show that there couldn't possibly have been a builder's fee because there wasn't any specifications as to the building, that no final form, nobody could possibly give a figure of a building, [316] how much it would cost to construct it unless they had some kind of a plans or general concept of the building and now you say that he wanted all of the money to make this particular building, to build this particular building. I can't reconcile those. Could you explain that to me, please?

A. If you will explain your question a little more definitely, I can.

Q. Well, the position has been in the defense of this case that Mr. Waxberg could and you could not possibly have had an agreement because there was no specific building upon which there could be an agreement made and there was no fixed amount of money so consequently there couldn't be any contract at all and yet right at that same time you testified that Mr. Waxberg demanded every cent of the money for the building to build the building?

A. No, I have not testified to that.

Q. Well, what did he demand when you stated that he said he wanted all of the money, the one million six hundred ninety-four thousand, well, the figure you have testified as to the commitment, you said that Mr. Waxberg claimed that he needed all

(Testimony of Rudell P. Hill.)

of that money to build the building you wanted built?

A. I think the evidence covers that. The commitment was issued for that amount. When Mr. Waxberg learned what the commitment was issued for he took that full amount of it and demanded it for the contract irregardless of what the FHA withheld and what had to go to the architect. [317]

Q. Isn't there a matter of ten percent some place that the owner has to put in over and above, doesn't FHA just go ninety percent? A. Yes.

Q. Who was going to supply that ten percent?

A. I was putting in my property which is on the city tax rolls for very near that amount. We were forty-five thousand dollars short as our paper work for the FHA I could use this forty-five thousand dollars of the possible builder's fee and repay Mr. Waxberg later for it.

Q. He didn't want any part of the building but he wanted fifty-one percent of the building?

A. Later, yes, when he and Mr. Orsini thought they had me cornered with my back to the wall, they demanded fifty-one percent and the management contract.

Q. Now, wasn't it just the reverse, Mr. Hill. After you had the commitment you didn't need Mr. Waxberg and Mr. Orsini anymore?

A. Oh, no.

Q. You don't even know whether you, although it is quite probable you may have had a conversation with Mr. Waxberg, but yet his name appears as

(Testimony of Rudell P. Hill.)

a sponsor right on through, do those things just happen like that, Mr. Hill?

A. Sometimes I believe they do. In this particular case we were in the hands of Mr. Sumter and the National Bank of [318] Commerce. We were accepting their figures and their way of preparing an application. They assured us that that is all it meant, that it was forty-five thousand dollars that I would later have to repay Mr. Waxberg. Those things happen in that manner when we are in the hands of experts that understand what they are doing.

Q. Actually, when you started this project you didn't know very much about buildings, or how to build them or how to finance them or anything about it?

A. I knew considerable about buildings and how to build them. I have been in construction work from the time I can remember, although I have never been a contractor, but I did not know anything about financing. In fact, I was amazed now at how little I did know at that time about financing.

Q. It has been quite an experience, hasn't it?

A. If I can remember all I have learned of this, I will do well.

Q. I believe you stated that Mr., that you did not request Mr. Hill to talk with your architects?

Mr. McNabb: What is this now, try that again.

The Court: Well, counsel merely said Hill. He intended Waxberg, isn't that right?

Mr. Hepp: I will start all over.

(Testimony of Rudell P. Hill.)

Q. (By Mr. Hepp): I believe you stated that you did not request Mr. [319] Waxberg to go to Seattle and specifically to go to the architects, but that he, Waxberg, wanted to work with the architects, is that essentially correct?

A. Yes. Now, I don't know how my, at this time I don't remember how my notifying him was worded. It might have been come to Seattle at once, something that way, when I notified him to come to Seattle to work with the architects. It was for his protection so that he could keep building within bounds to where it was profitable for him to build.

Q. Would that be pursuant to an agreement that he had with you to build the building?

A. It was a contemplated agreement but he had to have that privilege before he could make an agreement to build a building.

Q. A kind of an agreement to make an agreement?

A. Yes, negotiations for an agreement, you might say.

Q. When did you discharge Chiarelli and Kirk as architects?

A. When this project could not go ahead, when Mr. Waxberg and Mr. Orsini, Mr. Orsini was withdrawing his financial support. Mr. Waxberg was not a bit interested in the building contract. There was nothing more for Chiarelli and Kirk to do. I could not pay for them for drawing ninety thousand dollars for maybe complete plans I could not use. Naturally I discharged Chiarelli and Kirk.

(Testimony of Rudell P. Hill.)

Q. Who drew the plans that you ultimately did build? [320]

A. Is that question material, relevant to this case, who drew the plans for another building?

Q. I was wondering if you needed plans drawn to build a building?

A. Yes. Mr. Peck drew plans. If you want to know why—(Interrupted)

Q. Well, you said you didn't need any plans from Chiarelli and Kirk. I wondered if you needed any plans from anybody?

A. I did but another contractor that was going ahead with the project had an architect that he wanted to prepare the plans for him.

Q. Who hired Chiarelli and Kirk in the first instance? A. I did.

Q. Mr. Waxberg didn't?

A. As I remember it, no, Mr. Waxberg had not been in Seattle at the time I hired Chiarelli and Kirk. He had probably been in Seattle but not in connection with this case.

Q. You saw fit to hire an architect to assist Mr. Waxberg in the building, but you allowed your next contractor to select his own architect?

A. No, the next contractor and I consulted on the architect. He wanted the same proposition Mr. Waxberg had that he could work with the contractor, with the architect and keep the plans within reason.

Q. Actually all the people that worked with you in the [321] beginning of this building fell by the

(Testimony of Rudell P. Hill.)

wayside shortly after the commitment was made, is that right? A. Definitely.

Q. Did you answer my question, Mr. Hill, what these, how much of these life savings, how much that amounted to as of the time when the commitment was issued, how much you had spent?

A. I think I answered that in that way, that my life savings was tied up in the property, what I had accumulated in this world was tied up in property that was to go in. A part of it I owned free and clear. It was business property where I was conducting a business, and I had contracted to pay for the rest of this property and I had to pay for the rest of this property which was a considerable sum of money, plus my expenses. Some FHA fees, some architects fees that I had to advance and one thing and another why it was considerable.

Q. Well, those are fees that I believe that you talk about that were contained in that two hundred thousand dollars? A. Yes.

Q. FHA fees?

A. Yes. The property was the important part of it. I had contracted to purchase what I had not direct ownership at that time. I had no cash, but I had carried the load until that time, yes. Until the commitment was obtained and was responsible for any fees incurred if the commitment was not issued.

Q. Mr. Hill, has it always been your intention, your attitude that Mr. Waxberg should not be paid for any of the [322] services that he rendered to you?

(Testimony of Rudell P. Hill.)

A. Have we established—(Interrupted)

Mr. McNabb: Just a minute, just a minute. I am going to object to that on the grounds it is improper cross examination.

Mr. Hepp: He has set it up in his pleadings, your Honor.

The Court: Overruled. He may answer.

Mr. Hill: Have we established that Mr. Waxberg furnished me any services.

Q. (By Mr. Hepp): Did he?

A. None that I know of.

Q. This whole thing just happened, his name on the commitment, everything agreed with him to leave forty-five thousand of his builder's fee in there, all that no assistance at all?

A. Mr. Waxberg was making every effort to secure a contract to build a building. He has told you in his evidence that he expected to be repaid from any money or any services that he put out from the contract of the building.

Q. Well, now, if you are the one that calls off the contract?

A. Did I call off the contract?

Q. Did you? A. No.

Q. You didn't? A. No. [323]

Q. You didn't?

A. No. I could not meet his demands. He would not accept what I had to offer and what we had planned that we would have to offer. That he would not take. He wanted more than I could give him, two hundred thousand dollars more.

(Testimony of Rudell P. Hill.)

Q. More than was in the original agreement?

A. There was no original agreement. When we had come to know what money we had to build with he wanted two hundred thousand dollars more than it was possible in it so, and he refused to accept a contract for what was available to give him. I later contacted him and tried to talk sense with him. That is all the money there is, can you go ahead and build it for that? He says, no, I cannot.

Q. You had at that time determined what kind of a building you were going to build. I don't know how you can agree on a figure or whether somebody can build a building or they can't build a building if there are no plans or specifications or nothing to go by?

A. That is why I maintained that I was being put to the wall for demanding more than there was for any type of building we would draw plans for. He demanded the full commitment price before he would go ahead as his contract price to help design a building. I showed him how much money I had. He said, that is not enough. The commitment says for so much. He says I want that. [324]

Q. That is what he said? A. Yes.

Q. Down there in the New Washington Hotel?

A. Yes. Regardless of the design of the building he wanted the full commitment price without any deductions for financing fees or the FHA or architects fee so the building was not finally designed.

Q. Well, now, if a mortgage company will loan a million and a half dollars on a building, does that

(Testimony of Rudell P. Hill.)

contemplate a million dollars and a half worth of building or does it contemplate a million and a quarter dollars worth of building and the rest in financing fees and all those things; are those part of the value of a building that is mortgaged?

A. Just a minute, please, on that. The lender was lending ninety percent of the value of the building. I was furnishing ten percent equity. Part of the cost of that building is architects' fees and financing fees, not construction costs or contractor's fees. When you design a building part of your cost of your building is architects' fees. It is probable if you have, unless you have an enormous amount of cash part of it is in financing fees.

Q. How much is forty-five thousand dollars worth of operating capital worth, Mr. Hill?

Mr. McNabb: Just a minute. That is not material to the issues here involved. There is no testimony that there was [325] any forty-five thousand dollars worth of working capital. Improper cross examination.

The Court: Will the reporter, please, read the question.

(Thereupon, the reporter read the question.)

The Court: Objection sustained.

Q. (By Mr. Hepp): Did you and Chiarelli and Kirk part good friends?

Mr. McNabb: I object to that as having no bearing on the issues of this case.

The Court: He may answer.

Mr. Hill: No.

(Testimony of Rudell P. Hill.)

Q. (By Mr. Hepp): A little bitterness there, too?

A. Yes, they wanted the price for the full final plans not for what they had done. They wanted the rest of their fee for finishing final plans.

Q. Well, we must necessarily deduce, Mr. Hill, then that everybody has tried to take advantage of you or you have tried to take advantage of everybody else in this circle?

A. When there are disagreements not necessarily so.

Q. Well, evidently the people we work with—
(Interrupted)

A. Are we interested in deductions?

Q. Evidently the people that you have worked with one way or the other either made excessive demands on you or you made excessive demands on them? [326]

A. On the other hand I have quite a number of friends. I have employees that have worked for me as high as thirteen years still with me, very good friends of mine that I would do considerable for. That is along the same line of your question.

Q. Just like probably Jack the Ripper had a few friends, too?

A. If you want to compare me with Jack the Ripper, yes.

Q. Well, merely in theory?

A. In theory all right.

Q. Everybody has friends, sir, that is not a test.

A. Umm-hmm.

Mr. McNabb: I object. We are getting pretty far afield.

(Testimony of Rudell P. Hill.)

The Court: Yes, we are getting pretty far afield.

Mr. Hepp: May I have just a moment, your Honor?

The Court: Certainly.

Q. (By Mr. Hepp): Mr. Hill, do you recall when you dismissed Chiarelli and Kirk in this whole venture, was that, in relation to the commitment?

Mr. McNabb: Just a minute. I am going to object to the question on the grounds it is not proper cross examination; that when Chiarelli and Kirk were dismissed, if they were dismissed, has no bearing on the issues of this case.

The Court: Overruled. He may answer. I think he has already testified he dismissed them.

Mr. Hill: It was, the exact date I don't know. It was [327] some months after our last conversation with Mr. Waxberg when we had given up being able to go ahead. They wanted the money for work on final plans which I could not go ahead with, guarantee them money to produce these final plans. They were pressing me for money and I told them they just as well quit and call it off. I had no further use for their plans; that I couldn't pay them for any further work regardless of how they felt, what they felt they were entitled to.

Q. Isn't their fee fixed in the commitment or the project analysis?

A. Oh, yes, but if we couldn't use their plans that fee did not come. If they had any money coming, if we did not use that plans, use that money to build that building where was the money to come from for them to pay them. Out of my pocket.

(Testimony of Rudell P. Hill.)

Q. When did you decide to build a different kind of a building then than this building you got the commitment on?

A. A year later. We had renewed our commitment and kept it in good standing on the possibility that we might be able to save something of the disaster but as far as going ahead and preparing plans, no, we could not do it until we had some assurance we could go ahead.

Q. You had a commitment I believe February the 24th, is that right? A. Yes.

Q. 1950? A. Yes. [328]

Q. Now, when did you decide to build a different kind of a building than the plans, the preliminary plans here show, when after the commitment date?

A. I would have to check records to find out when.

Q. I mean, was it early that spring, in the summer, the fall or the next year?

A. It was the next year.

Q. When did you decide not to build this building the preliminary plans of which I believe are an identification here?

A. Oh, it was some months later. The exact date I don't know. It was some months later.

Q. After you had discharged Chiarelli and Kirk?

A. Yes, after I had discharged Chiarelli and Kirk. Because I told them I didn't really discharge

(Testimony of Rudell P. Hill.)

them. I told them to do no further work until I had some assurance that I could pay them.

Q. Pay them for what they had done or the full —(Interrupted)

A. For the rest of it, yes. This work was completed. They weren't discharged from this work. It was completed. But it was discharging them from doing any more work for me until such time as I could pay them for it, could use their work.

Q. This drill log that you spoke of that Mike Erceg, that came along a lot later, didn't it?

A. Yes, considerable later.

Q. That had nothing to do with getting an FHA commitment at the outset? [329]

A. No, it was for the structural engineer. Those drill cores were sent to a testing laboratory for analysis before a structural engineer could start to design the footings. And the footings were only designed on final plans, not on preliminary plans. They were not even used on the preliminary plans that we later submitted.

Q. Did you ever have occasion before the application was filed to ask Chiarelli and Kirk whether or not the building which they were making preliminary plans was a feasible one?

A. They asked me what I knew of the soil construction. I told them as far as I know it was sand and gravel. If that was the case then we seemed to be, until we needed further data, go ahead.

Q. Would it make any difference if there were permafrost down there?

(Testimony of Rudell P. Hill.)

A. That would make a difference to the contractor and not to the builder. If there was a contractor when he started to excavate and prepare for footings it would have made a difference to a contractor, yes.

Q. Well, now, what was under the Polaris Building, sand or gravel? A. Both.

Q. But what was there at the time when these preliminary plans were drawn was not important to Chiarelli and Kirk in designing these plans?

A. They designed no footings, no.

Q. They designed no footings?

A. They designed no footings or foundation at that time.

Q. As far as I can see then, these plans served absolutely no purpose except to get a commitment out of the FHA?

A. That is all they have ever served.

Q. Then they were abandoned?

A. That is all that preliminary plans were prepared for. That was the purpose they were intended for.

Mr. McNabb: May we have the noon recess now, your Honor.

The Court: Is that agreeable with the plaintiff's counsel? Members of the jury, once again I admonish you that it is your duty not to discuss the subject matter of this trial with anyone or among yourselves; not to express any opinion thereon until the case is finally submitted to you. And you are excused until two o'clock.

Clerk of Court: Court is recessed until one-thirty.

(Thereupon, at 12:00 noon, the trial of this cause was recessed until 2:00 p.m.)

Afternoon Session

(The trial of this cause was resumed at 2:00 p.m., pursuant to the noon recess.)

Clerk of Court: Court has reconvened.

The Court: Parties wish to stipulate to the presence of the jury? [331]

Mr. McNealy: Yes, your Honor.

Mr. McNabb: Yes, your Honor.

RUDELL P. HILL

the witness on the stand at the time the recess was taken, resumed the stand.

Mr. Hepp: No further questions.

Redirect Examination

Q. (By Mr. McNabb): Mr. Hill, for what purpose did you employ the firm of Chiarelli and Kirk?

A. To prepare preliminary drawings, as requested, as needed for the FHA application.

Q. Did you employ them for the purpose of assisting Mr. Waxberg? A. No.

Q. So far as securing the commitment and the preparation of the application for the loan is concerned, did you need the assistance of Mr. Waxberg or Mr. Orsini?

A. I needed very badly the prepaid rent that

(Testimony of Rudell P. Hill.)

Mr. Orsini was to furnish to help me finance. I needed a builder, a contractor, preferably a local contractor to keep the money in town.

Q. How much prepaid rental was it that Mr. Orsini was supposed to give you?

A. Fifty thousand dollars. [332]

Q. For what purpose did you need that?

A. Help purchase property, pay fees, pay expenses in getting this project organized and in shape to go.

Q. Mr. Orsini aware of that?

A. He was.

Q. Mr. Hill, this equity that has been discussed, that is there to be a ten percent equity if I understand the situation correctly, is that right?

A. That's right.

Q. Now, was there any requirement as to what that equity was to be?

A. Other than the ten percent of what we applied for?

Q. That's right.

A. No, it could be in several forms. It could be in land. It could be in cash. It could be to show that I had invested that much money, that there was that much money invested to offset the government's guaranteed loan.

Q. And in this instance the bulk of the ten percent was in what? A. In property.

Q. What sort of property?

A. You mean a legal description or part?

(Testimony of Rudell P. Hill.)

Q. No, was it personal property or real property?
A. Real property.

Q. What do you mean by real property? [333]

A. Land.

Q. Were you occupying any portion of the land at the time you made this application?

A. Yes.

Q. For what purpose were you occupying it?

A. My business was then located in a building on that land. I had a bar, a liquor store, I had four business spaces rented under lease that I had to arrange for those leases to, I don't know, leases to be released back to me.

Q. In the event that you had *exceeded* to the demand for fifty-one, or interest of fifty-one percent in the corporation who then would have controlled all of your land?

A. The one that got the fifty-one percent, absolute control.

Q. Who would that have been?

A. Mr. Waxberg. The management contract would have left me with no income whatever or a chance of an income whatever from that time on. The only way that you can get money from an FHA controlled corporation under one of these set-ups is through a dividend and there was no dividend allowed until such time as the loan has been repaid.

Q. So then you would have realized no income from the entirety of your property under the, under the requested agreement with Mr. Waxberg?

(Testimony of Rudell P. Hill.)

A. None whatever for thirty years, or thirty-two, whatever the mortgage was to run. [334]

Mr. McNabb: I have no further questions.

Recross Examination

Q. (By Mr. Hepp): Well, didn't you still own your bar and those other buildings which you were talking about?

A. They would have had to have been destroyed to complete the building as the plans were at that time. The building would have been on that property.

Q. Well, now, if you were to change plans with another contractor or if there had been no definite plans formulated how does that effect Mr. Waxberg, why would the situation be different?

A. Would you— (Interrupted)

Q. I will rephrase the question. Maybe that wasn't very fair. You build a building and still preserved these other properties that you have just mentioned, is that right? A. Yes.

Q. And they are not a part of the building?

A. They are not.

Q. Wasn't it possible for Mr. Waxberg to have built that building and still you retained these properties which you say would have been forever lost from you?

A. It was impractical because the building was of so much more value if it could have been extended through the street. The business location, if I had at that time restricted the building to its

(Testimony of Rudell P. Hill.)

present location I was losing at that time the financing of prepaid rent of Mr. Orsini. He was advancing, I was losing the location he needed at that time, that he wanted. [335] He was willing to pay prepaid rent on it.

Q. The building that you ultimately built though was equal or greater value than originally planned, is that right or not?

A. Costwise, yes, but not in value and commercial rental space.

Q. Was there some question about a title as against the Dales at that time that may have influenced your decision?

A. Later there was a question of title is what influenced our decision to build it on a smaller lot, but at that time as I remember, no question of title had arisen on that land.

Q. But as it ultimately developed there was a question?

A. There was later, yes, but that since has been resolved.

Q. You mean the difference between forty-nine percent and fifty-one percent is the difference between your not getting any income for thirty-two years and your getting income in thirty-two years?

A. The difference between controlling interest in a corporation, fifty-one percent of the stock is absolute control of the corporation because it votes by stock and fifty-one percent of the stock controls every action of that corporation plus the manage-

(Testimony of Rudell P. Hill.)

ment contract would have taken even a salary from me.

Q. You feel that the directorship of, being out of your control, everything would have been taken away from you?

A. I, there was no conceivable way that I could have received any benefits from the building until such time as the [336] corporation could declare a dividend or the sale of stock that was left to me after they had sold some of that remaining forty-nine percent to raise added capital.

Q. Did you know Mr. Mullen, Sr., of Mullen Contractors in Seattle?

A. I became acquainted with him about a year later.

Q. Has he since died? A. He has.

Q. Mr. Hill, during the year of 1950 or the early portion of 1951, did Mr. Mullen, Sr., give you fifty thousand dollars?

A. No. I still owe the S. S. Mullen Company considerable money that I am paying as we had intended to repay the stock, the builder's fee to Mr. Waxberg. I am still paying on that same thing with Mr. Mullens.

Q. Did you deposit the sum of fifty thousand dollars into a bank account which was later put up for the FHA?

A. Did I deposit?

Q. Or some agent of yours in your behalf?

A. I don't know that it was. I don't remember any such transaction.

(Testimony of Rudell P. Hill.)

Q. I didn't quite catch your answer.

A. I certainly remember no such thing, no.

Q. But you didn't need Mr. Waxberg's forty-five thousand when you ultimately built?

A. I think I have explained that in detail. If you want me [337] to go into detail again, I can.

Q. Did you pay Mr. Orsini back the five thousand dollars that he gave you?

A. Not to Mr. Orsini. It was not his money that he furnished. I paid the money to Dawson Cooper.

Mr. Hepp: I have no further questions.

Redirect Examination

Q. (By Mr. McNabb): Mr. Hill, this forty-five thousand dollars that is mentioned in the application, was that to have been advanced to you by, out of Mr. Waxberg's pocket?

A. No. It was a waiving of a fee that I would later reimburse him for.

Q. I believe, I hand you Defendant's Identification F. Did you ever see this instrument, Mr. Hill?

Mr. Hepp: Just a moment, Mr. Hill. Your Honor, I think ample opportunity has been given counsel to identify these identifications and I am going to ask that he either have them offered as exhibits before further testimony has been given on them. I know that much has been used of them, but our waiver up to this point is not a continuing waiver here on out.

Mr. McNabb: Waiver of what, Mr. Hepp?

(Testimony of Rudell P. Hill.)

Mr. Hepp: Waiver of having those things either offered as exhibits and testified from as exhibits. You can't testify from identifications merely identified. They are not in evidence [338] and I refuse to have them read from further until they are offered as exhibits and then they can be read from.

The Court: Gentlemen, I see no reason for not commenting at this time in the presence of the jury, but I have been somewhat surprised at the method of using Identifications in this Court. It has been the practice, it has happened in every case that I have sat in in this Court and I am going to state now that I think it is a very confusing way to try a lawsuit, but I am not directing this remark to any particular attorney. I want the jury to understand that. It is just that it has been the practice of doing court work here. It is my feeling that after there has been an exhibit identified and after the foundation is laid that is an ideal time to make the offer. Otherwise the Court, if it is delayed and waited around, we don't know what foundation has been laid for the offer and I believe it is a better practice that the exhibits be offered after they have been identified and then we will not have any problem at all relating if they are received in evidence relating to the use of the Identification or Exhibit, so with that in mind, counsel, I wish that you and other counsel would make seasonable offers after the Identification has been made.

Mr. McNabb: Now then, will the Court rule on the objection?

(Testimony of Rudell P. Hill.)

The Court: The Court will sustain the objection.

Mr. McNabb: On what grounds? [339]

The Court: On the grounds that through the entire trial reference has been made to exhibits, this particular exhibit the witness testified from, the exhibit or the Identification of the exhibit without the exhibit having been offered or received in evidence.

Mr. Hepp: For the purposes of that question I will withdraw my objection.

The Court: Very well.

Mr. Hepp: Just yes or no, please.

Mr. Hill: Yes.

Q. (By Mr. McNabb): When did you first see it, Mr. Hill?

A. Mr. Sumter showed it to me.

Q. Did you at any time ever ask or have any conversation with Mr. Waxberg as to his cash position?

A. He told me that he was able to— (Interrupted)

Mr. Hepp: Just a moment. Excuse me.

Mr. Hill: Yes, I did.

Q. (By Mr. McNabb): Did you ever have occasion to ask him if he had forty-five thousand dollars?

Mr. Hepp: Just yes or no, please.

Mr. Hill: No.

Q. (By Mr. McNabb): Did you ever ask him how much cash he had? [340]

Mr. Hepp: Just yes or no.

Mr. Hill: No.

Q. (By Mr. McNabb): Did he ever indicate to

(Testimony of Rudell P. Hill.)

you that he had forty-five thousand dollars?

Mr. Hepp: Now, I object to that unless counsel explains what he means, indicate to him. I don't think it is a fair question. It could bring a highly speculative answer.

The Court: Sustained.

Q. (By Mr. McNabb): Did Mr. Waxberg ever tell you how much cash he had? A. No.

Mr. McNabb: You want that answer stricken?

Mr. Hepp: Yes, I am going to object to it and ask that the answer be stricken and that counsel be asked to identify times and so forth so I will have an opportunity to object. I don't know when he is talking about, in the last five years, any time.

The Court: It may stand. Proceed, counsel.

Mr. McNabb: I have no further questions, your Honor.

Mr. Hepp: Neither do we.

(Witness excused.)

Mr. McNabb: The defense rests, your Honor.

The Court: The defense intend to offer into evidence any of the identifications before resting or are you resting advisedly, Mr. McNabb? [341]

Mr. McNabb: Well, of course, your Honor, we intend to offer the entirety of the Identifications in evidence.

Mr. Hepp: Well, I believe, your Honor, in that case it should have been done before they rested their cause.

Mr. McNabb: We have a perfect right to put on any sur-rebuttal.

The Court: Does the defense move to re-open for the purpose of offering Identifications A to G, inclusive.

Mr. McNabb: Yes, if we may, your Honor, and in addition the Plaintiff's Identification No. 3.

Mr. Hepp: I would like to go through these before I state whether we oppose any of the offers.

The Court: Yes and, gentlemen, perhaps there are some times when it is advisable to withhold the offer, but this illustrates exactly what I meant. We may have twenty or thirty Identifications and they are all accumulated and the offer made at the close makes it a very difficult proposition for the Court and for the attorney, for the jury. The Court will certainly give the plaintiff an opportunity to examine the Identifications. May I see Identification F, Mr. Clerk. Mr. Hall, will you give these to Mr. Hepp.

Mr. Hepp: We have no objection to Defendant's Identification G, A, D, B, C, I think unless, sir, that is an E, I don't know.

Clerk of Court: That is C. [342]

Mr. Hepp: C. We object to Identification E, has not been properly identified and pertinent there having been testimony that there are other writings on it. We object to F, the same being a financial statement which as I recall the testimony now was only that it was brought to an office. There has been no signature identified on it to my recollection. And we object to H and I as not being contained within the issues of this Court date-wise or otherwise. It refers to transactions occurring according to the

witnesses testimony, a year or more later, a year and a half later and nothing to do with the commitment, the application, any part of this matter in which Mr. Waxberg and Mr. Hill are in controversy here and in connection with any buildings which have been pertinently discussed here and particularly reflected by Identification A, being the preliminary plans.

And we are completely indifferent about Identification 3. He offered it. We certainly don't object to that. Those are our objections to the offer of the defendant.

The Court: May the Court examine Identification F? At this time the Court will receive into evidence Defendant's Identification A through I, inclusive, except for Defendant's Identification F. Strike that. Defendant's Identification E. And the Court will also admit into evidence Plaintiff's Identification No. 3.

Clerk of Court: Do I understand it is E and F that are excluded? [343]

Mr. Hepp: F is admitted. E is excluded.

The Court: F is admitted. E is excluded.

Clerk of Court: Identification A is Defendant's Exhibit 1; B, No. 2; C, 3; D, No. 4; F, No. 5; G, No. 6; H, No. 7; I, No. 8; and Plaintiff's Identification No. 3 is Defendant's No. 9.

(Defendant's Identifications A through D, inclusive, were received in evidence as Defendant's Exhibits 1 through 4, inclusive.)

(Defendant's Identifications F through I,

inclusive, were received in evidence as Defendant's Exhibits 5 through 8, inclusive.)

(Plaintiff's Identification No. 3 was received in evidence as Defendant's Exhibit No. 9.)

The Court: The defendants rest?

Mr. McNabb: We again rest, your Honor.

Mr. McNealy: Call Mr. Philleo.

EDGAR PHILLEO

a witness called in behalf of the plaintiff in rebuttal, was duly sworn and testified as follows:

Direct Examination

Q. (By Mr. McNealy): Will you state your name, please? A. Edgar Philleo.

Q. And what is your business, Mr. Philleo.

A. I am a professional engineer. [344]

Q. Here in Fairbanks, Alaska?

A. Yes, sir.

Q. And that Philleo Engineering Service?

A. That's right.

Q. What is the correct name?

A. Philleo Engineering Service.

Q. And were you so engaged in business here in, during the month of January, 1950? A. I was.

Q. Are you acquainted with the plaintiff, Mr. Waxberg, and the defendant, Mr. Hill?

A. I am.

Mr. McNealy: I would like to have this marked for identification, one page.

Clerk of Court: Plaintiff's Identification No. 9.

(Testimony of Edgar Philleo.)

(Carbon copy of invoice of Philleo Engineering was marked Plaintiff's Identification No. 9)

Q. (By Mr. McNealy): Did you ever have occasion to make any survey of real property for either Mr. Hill or Mr. Waxberg?

A. Yes, several occasions for both. Both individually that is.

Q. Handing you Plaintiff's Identification 9, I will ask you if you have ever seen that page in that particular book before? A. I have. [345]

Q. And do you know whose handwriting that is?

A. It looks like my handwriting. I initialed it.

Q. Is that a record that you keep in the regular course of your business? A. It is.

Q. Those are your initials appearing thereon?

A. Yes, sir.

Q. Do you recall, yes or no, whether you ever surveyed any property belonging to Mr. Hill between First and Second Avenue on Lacey Street?

A. Yes.

Q. Is there any connection between that particular survey and the Identification 9?

A. Well, now you asked me if I recalled ever having made a survey for Mr. Hill in that block. I think I have surveyed it a couple different times but there is a connection between this bill and one of those surveys.

Q. What date appears upon that?

A. January 31st, 1950.

Mr. McNealy: If the Court please, I am going

(Testimony of Edgar Philleo.)

to offer this record as a record kept in the usual course of your business, is that true?

Mr. Philleo: It is.

Mr. McNabb: We have no objection.

The Court: It will be received. [346]

Clerk of Court: Plaintiff's Exhibit H.

(Plaintiff's Identification No. 9 was received in evidence as Plaintiff's Exhibit H.)

Q. (By Mr. McNealy): Do you recollect, Mr. Philleo, on this in regard to Plaintiff's Exhibit H?

A. Is this Exhibit H?

Q. Plaintiff's Exhibit H here whether or not, did Mr. Waxberg or Mr. Hill or both or do you remember who instructed you to do the work represented by that bill?

A. I don't recall exactly who instructed me, no.

Q. And do you recall who employed you or—
(Interrupted)

A. No, frankly, I don't recall who it was.

Q. The bill has been paid, has it?

A. The bill has been paid, yes, sir.

Q. Do you recall who paid you?

A. No, not for certain.

Q. I wonder, would you read the writing, the figures on the bill to the jury, please?

A. Well, I can. Up at the top it says, Al Waxberg and R. P. Hill, services for month of January, 1950. It is dated by the way 1-31-50, and it is my invoice No. 00340. It is services for the month of January 1950. Survey. Office three twenty-six. Total

(Testimony of Edgar Philleo.)

five hundred seventy. Marked charge and my initials. [347]

Q. What does the office work, I will withdraw that. The survey stated here, is that the survey of the Hill property between First and Second Avenue on Lacey Street in Fairbanks?

A. As I recall it was a portion of that property. Possibly it was all. I can't tell from that particular record.

Q. Would you state what the office work represents, what that represented?

A. I don't recall exactly but ordinarily it is for plotting of maps, calculations of survey notes and so forth.

Q. Do you recall at this late date whether either Mr. Waxberg or Mr. Hill were present when the survey was being taken?

A. You mean present in the field?

Q. Yes.

A. I don't recall. I didn't make the survey myself. It was made under my direction by some of my men, but I wasn't in the field all the time. I probably stopped by there.

Q. And do you have any present recollection as to whom the plots or specifications, plats were delivered to?

A. I believe they were delivered to Mr. Waxberg but I am not positive of that.

Mr. McNealy: You may take the witness.

Mr. McNabb: We have no questions.

(Witness excused.)

Mr. McNealy: If the Court will excuse us just one moment. [348]

The Court: Certainly.

Mr. Hepp: We will rest.

Mr. McNabb: We rest, your Honor.

The Court: Members of the jury, both parties have rested which means that the evidence in the case has been concluded. It is about time for the three o'clock recess and perhaps the recess will be a little longer than usual, but I give you the usual admonishment not to discuss this case with anyone or among yourselves; and do not express any opinion until the case is finally submitted to you. You are excused for at least 10 minutes.

(Thereupon, the jury withdrew and the following proceedings were had out of the presence and hearing of the jury):

Mr. McNabb: The defense would like to be heard following the recess.

The Court: Following the recess. Yes, perhaps, all right. And the Court will recess for ten minutes.

Clerk of Court: Court will recess for ten minutes.

(Thereupon, at 2:55 p.m., the Court took a recess until 3:05 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: If the parties wish to waive the presence of the Clerk we may proceed without him.

Mr. McNealy: Very well.

Mr. McNabb: Your Honor, I now move the Court for a [349] directed verdict as regards the

third amended complaint. Pardon me, each of the several grounds that I have heretofore advanced and now additionally for the reason that we feel that the testimony of the defense which has not been controverted by the plaintiff by reason of the failure of the plaintiff even to deny the statements or the evidence which was introduced on behalf of the defense in this case causes that to stand true. In that event we feel that the defense has established that if there was a contract that ever existed between the parties or that if any labor was performed by the plaintiff in this action that if he received or failed to receive any value or any benefit from it, it was not due to the fault of the defendants but if that there was in fact a violation of any agreement that it was a breach and a violation by this plaintiff; that the money which the plaintiff sought for the construction of a building was not available and could not have been available and it was known to the plaintiff that it was not available; that the defendants in this action have stated that they were perfectly willing that the plaintiff construct the building if he could do it on the amount of money that was then available under the commitment. The plaintiff has not come back to rebut that testimony and that if there were any loss occasioned to the plaintiff by reason of any of the services which were performed or the money expended it was not due to any fault on the part of the defendants; that they stood ready and willing to proceed; and that testimony, your Honor, has not been [350] controverted, your Honor, and has not

been denied and at this time I think the testimony of Mr. Waxberg that he has some recollection of a discussion concerning fifty-one percent of the stock becomes exceedingly relevant, highly valuable testimony in regard to, taken in view of and in light of the testimony of the defendant, Mr. Hill and he says that such a demand was made upon him.

Of course it is, it is now and has always been our contention that the moneys were expended and the labor and the services were performed for the purpose of securing a contract; that there is not and never was a reliance on the existence of a contract. We feel that there is not now nor has there ever been any evidence sufficient to warrant allowing this case to go to the jury. We, therefore, move for a directed verdict as regards the third amended complaint.

The Court: Let me compliment counsel on a concise, well-stated argument. Mr. Hepp or Mr. McNealy.

Mr. McNealy: If it please the Court, we believe the original testimony of the plaintiff here was in, and that of the defendants was in direct controversy and in my opinion there is a, sufficient for the, before the Court here for the matter to go to the jury. It is not upon mere statements which the plaintiff remembered in the case but if, I would like a quotation taken from the text of the opinion of the courts, *Thurston vs. Nutter*, 47 A.L.R., 1161 where it says, but if the agreement instead of [351] being as contended by the plaintiff or by the defendants was not completed because there was not

a clear concession on both sides to one and the same set of terms or a complete mutuality of engagement so that each had the right at once to hold the other to a positive agreement then the plaintiff could maintain an action on quantum meruit because where one party renders services beneficial to another under circumstances that negative the idea that services were gratuitous and the party to whom the services are rendered knows it and admits it and accepts the benefit he is bound to pay a reasonable compensation therefor.

What applies so much in this action is the conclusion of that statement. I quote, "that is because such facts and circumstances justify a presumption that the party to whom services are rendered must have requested them and, therefore, the law applies." I believe further that the exhibits entered in here and the showing that Mr. Waxberg is the co-sponsor, his name appearing throughout the exhibits which made possible the securing of this FHA commitment which was later used as a revised commitment in the actual construction of the building and due to all of the controverted statements between the parties; Mr. Hill states there fifty-one percent, the difficulty that arose over this and Mr. Waxberg on the other hand testified I believe on both occasions on the stand it was a matter of a fifty thousand dollar kick-back that caused the Hills to, I believe, your Honor, that the, I certainly am willing to state to the Court that I would [352] like to have had the plaintiff more definite in regard to it but in view of the fact that he was not more defi-

nite, told only what he did remember, then we must go back, rely upon the presumption there that the defendants allowed him to go ahead on this and the Courts say we have the right to presume that he must have requested those things. I believe the testimony was that he at least the architects requested the drill log set out that it was necessary to have this survey made at the time it was made. It appears that both Mr. Waxberg and Mr. Hill were billed for the survey. And I believe there are sufficient facts, your Honor, to go before the jury and for them to decide whether or not there was any promise to pay or any implied contract whatsoever.

The Court: Gentlemen, before I rule on the motion which, of course, I am about to do I wonder if counsel can point out to the Court wherein in the pleadings or in the evidence or either there is any cause of action made out against the defendant, Mary Hill. Through the entire trial I have been wondering where the cause of action is made out against Mary Hill and maybe there is something in the pleadings that would cover that. I don't know.

Mr. McNealy: Your Honor, I believe that there has been no cause of action made out against Mary Hill as the defendant here; that possibly when I prepared these original pleadings about five years or so ago there may have been a reason for it, but we certainly have failed to show it in this case.

The Court: Well, with that statement and the concession on the part of plaintiff's counsel, the

Court at this time will dismiss the action in so far as the defendant, Mary Hill, is concerned.

And now, gentlemen, it is significant to me that Mr. McNabb argued that perhaps after the defendants testimony is in uncontradicted by the plaintiff that it appears that the plaintiff himself was at fault. I was pleased that counsel used that argument because that is one that has been running through my mind. If I am to submit this third amended cause of action to the jury it is my intention to instruct the jury that an agreement was made between the plaintiff and the defendant because it isn't denied. Both parties testified to that; that an attempt would be made to procure a commitment from the Federal Housing Administration to build a building and if a commitment were not obtained as the plaintiff says he was to forget his loss as there was no understanding what would be done in that case; but if the commitment were granted both parties concede and so testified that if the commitment were granted that Mr. Waxberg would build the building.

Mr. Hill said he was very desirous of having Mr. Waxberg do it, local contractor, he was the man he wanted even after the commitment was made he hadn't changed his mind. He still wanted Mr. Waxberg. And it was subsequent to the commitment that the trouble arose. I can't find as a matter of law that the fault was Mr. Waxberg's. I can't find as a matter of law that the fault [354] was Mr. Hill's but they did not get together on their subsequent

agreement. They seem to have had an agreement to later agree on something and when the later time came, they didn't. Now, I don't know who was at fault. I think that is for the jury to determine after I instruct them as to the understanding that is clear in the evidence and I think it is my duty to further instruct the jury that if the fault was Mr. Waxberg's, that is the reason that they didn't get together, that Mr. Waxberg cannot recover. If, however, the fault was Mr. Hill's, the jury should find then Mr. Waxberg may recover such sums as he reasonably is entitled to for services and expenses. Or if neither party was at fault but they failed to agree and the jury is unable to pin the ball on either side still we know the contract did not materialize and then in that event I believe the jury may find for the plaintiff in such sums as reasonable as set forth in my instructions, not exceeding, of course, certain amounts as adduced by the evidence.

Now, perhaps it has no part of this particular proceeding but it certainly is unsatisfactory, the evidence is unsatisfactory as to what the plaintiff actually did in and about these negotiations. I thought that a party that worked forty-three days, if he did, on a project of this nature, would have the exhibit desk piled high with estimates and with various documents to substantiate the amount of work that he did, but as Mr. Waxberg kept saying repeatedly on the stand, it is so long ago he doesn't [355] remember those things. Well, he can't expect the Court to supply for him his failure to remember.

Do the parties have any requested instructions for the Court?

Mr. McNabb: Your Honor, I have some.

The Court: Do you have them prepared?

Mr. McNabb: Yes, your Honor.

The Court: You will present them at this time. The plaintiff have any requested instructions? The Court at this time denies the motion of the defendant. Does the plaintiff have any requested instructions? I believe I asked.

Mr. McNealy: No, your Honor.

The Court: Very well. We will take a ten minute recess.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon, at 3:25 p.m., the Court took a recess until 3:40 p.m., at which time it reconvened and the trial of this cause was resumed.)

Clerk of Court: Court is reconvened.

The Court: Gentlemen, do you suppose without the Court arbitrarily fixing the time for argument maybe we can agree to how much time the plaintiff wishes and the defendant?

Mr. Hepp: I propose, if the Court will advise how much time it wants for instructions that we split up the balance of the time.

The Court: Well, the instructions will not be ready [356] prior to argument.

Mr. Hepp: No, I understand that.

The Court: But the instructions are, I believe ready, will be, no matter how brief the arguments

are. In other words, the instructions are almost final.

Mr. Hepp: I believe, your Honor has stated what essentially the instructions, the pertinent ones which we would be interested in will be. I would be willing to— (Interrupted)

Mr. McNabb: Your Honor, I think each of us who have participated in this trial are sorely troubled concerning what is the applicable law. I think each of us thinks that he knows what law is applicable but because each of us has a perhaps separate and distinct opinion I request you now for an opportunity to examine the instructions prior to the argument for this reason, that it is not my intention to touch on any subject or state my opinion concerning any law which this Court feels is not applicable to this case. I do not know whether the Court at this time proposes to give the instructions which I have requested. I do not do this for the purpose of continuing this matter, but in justice to the Court and to the parties and to myself.

The Court: The, as I understand the Federal Rules of Civil Procedure of which I have not followed in all cases, as a matter of fact I believe in nearly every case that I have tried in this jurisdiction I have given copies of the proposed instructions to the attorneys prior to argument, which is a practice that [357] I rather like, but it is not required by the Federal Rules. You are entitled as I understand the rules to know the action taken by the Court on your requested instructions only and you are not entitled to the Court's instructions. The

reason that I have discontinued the previous practice of giving the attorneys the instructions is because I have seen them in this courtroom read from them to the jury and argue the law and I don't approve of that type of argument, but I understand your position, Mr. McNabb. You do not wish to argue, no attorney does, some point of law that might be opposite or contrary to the Court's instructions.

Mr. McNabb: That is correct, and I make this request to the Court not as to what the law is as regards my right to instructions prior to the argument or anything of the kind, but merely as a simple request.

The Court: Yes, and Mr. McNabb, if we are to follow that through that would apply to every case, would it not?

Mr. McNabb: Oh, that is indeed true. Certainly it would.

The Court: As I say, that is the theory under which I have been doing that, but I say I found some objections to it when the attorneys who have my instructions and start reading them to the jury and arguing at great length on the law of the case. Because of the hour of the day is another reason I have, I had decided to have you gentlemen argue before you received copies but if we want to await the instructions, at least the germane part, those that apply to this specific case. Those [358] would be the only ones you are interested in?

Mr. McNabb: Oh, my, yes. Of course, Judge, I think, the general ones I think we all know what

they are or will be. Now, I do not wish to burden the Court with this request and if the Court would prefer that we proceed.

The Court: No, I rather prefer the other arrangement. To me it looks more logical than the Federal Rules but who am I to challenge the Rules, but as a practicing lawyer I know that I always wanted to know before I argued what the Court was going to instruct the jury. Otherwise I felt that I didn't know what to argue. If we are to do that I will go back and check and see how long it will be.

Mr. Hepp: I have just been discussing this matter with Mr. McNealy. The plaintiff would be perfectly willing to start its argument on a factual basis relying upon its right of rebuttal in questions, that is interpretations of law as an attorney sees them in terms of argument to the jury. That way we may be able to avail ourselves of this time and thereby finish today at a reasonable hour.

The Court: And I like to bear in mind the convenience of the jury.

Mr. Hepp: We are willing to proceed under those circumstances. That will give the defense an opportunity to read the instructions before— (Interrupted)

The Court: Perhaps to best facilitate matters without [359] adjourning Court, I will step out for a moment and see what condition the instructions are in. Will counsel approach the bench, please.

(Thereupon, the attorneys approached the bench and the following proceedings were had out of the presence and hearing of the jury):

The Court: The only changes that I am making, I am making the defendant singular instead of plural. For one reason we lost a defendant and I wish to state, Mr. McNabb, inform him that his requested instructions one to five, inclusive, are each and all denied. I wish to state that if I felt that those instructions could be properly given I would feel it would be my duty to direct a verdict in favor of the defendant, so we are going on another theory. I will give you gentlemen copies of the proposed instructions. I now hand you each a copy. There will be no change except the word "defendants" where used will be changed to the singular, "defendant." And I will give you gentlemen each opportunities at this time before arguing to make exceptions to my instructions if you so desire.

Mr. McNabb: Your Honor, I take it that we will have the right to object prior to the time that the instructions are *ready* to the jury, when the instructions are in one group, the entirety. I do not wish to waive the right to object to this page, but— (Interrupted)

The Court: But the situation is this, Mr. McNabb, and [360] that is where you are perhaps getting into trouble, your only opportunity to except will be after the instructions have been given.

Mr. McNabb: Well, if I, Judge, if I understand this instruction correctly, after having gone through it hastily, it seems to me that the theory upon which this instruction is based is that of a breach of contract.

The Court: That is not the Court's view.

Mr. McNabb: At any rate, I wish to lodge an objection to this instruction, whatever it may be. I don't know how we can properly identify it at the time.

The Court: This is done at your request and accommodation to the parties and consistent, I believe, with proper procedure, while it is a departure from the Federal Rules.

Mr. McNabb: Judge, would you care to identify this though, just by some— (Interrupted)

The Court: I think for the purpose of Identification in the record you may say these are the special instructions which will be included in the general instructions.

Mr. McNabb: Well, I think I am going to object on the grounds that this instruction is not according to the law governing this case. The theory is on a breach of contract and that the evidence indicates that there was no contract.

The Court: Do you have any exceptions?

Mr. McNealy: No exceptions. [361]

(Thereupon, the attorneys withdrew from the bench.)

The Court: Now, gentlemen, the only thing left to determine is how much time you would like for argument. It is now ten minutes of four.

Mr. Hepp: The plaintiff will accept twenty or twenty-five minutes which, I think, doubled will still give the Court time to instruct the jury.

Mr. McNabb: Do you mean then forty or fifty minutes or do you mean that you would want twenty minutes for both of your presentations.

Mr. Hepp: Both sides. I mean if we could have, there are seventy minutes left in the working day and if you subtract twenty minutes for instructing the jury that will leave fifty minutes. We are satisfied with twenty-five of those.

The Court: You are satisfied, divide the twenty-five minutes.

Mr. Hepp: We will accept a total of twenty-five minutes.

The Court: Is that satisfactory, Mr. McNabb?

Mr. McNabb: Yes, your Honor.

The Court: Twenty-five minutes. Very well, the jury may be called.

(Thereupon, the jury entered the courtroom.)

The Court: Do the parties desire the argument to be taken by the official reporter?

Mr. McNealy: No, your Honor.

Mr. McNabb: Fine. [362]

(Thereupon, the official court reporter withdrew from the courtroom and the attorneys presented their arguments to the jury.)

(At 4:35 p.m., the Court took a recess to 4:45 p.m., at which time it reconvened, and the trial of this cause was resumed, the official court reporter then re-entering the court room.)

Clerk of Court: Court is reconvened.

The Court: Will counsel, please, approach the bench.

(Thereupon, the attorneys approached the bench and the following proceedings were had out of the hearing of the jury):

The Court: I don't wish to belabor you gentle-

men with stipulations. I am wondering whether we would stipulate or whether you gentlemen wish to stipulate that the verdict might be returned to the Clerk to be returned to the Court tomorrow.

Mr. Hepp: We were just talking about a sealed verdict.

Mr. McNabb: I think that is an excellent idea.

Mr. McNealy: We will stipulate.

The Court: And you wish to stipulate that the stenographer need not be present when the verdict is returned? Of course, the sealed verdict stipulation will take care of that.

Mr. Hepp: Satisfactory.

The Court: And the parties have any objection to the Clerk reading the instructions?

Mr. McNabb: Certainly not. [363]

Mr. Hepp: I don't have any.

Mr. McNealy: No.

The Court: Very well.

(Thereupon, the attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury):

The Court: At this time the Clerk of Court will read the Court's instructions to the jury. [364-5]

Instructions to the Jury

Ladies and Gentlemen of the Jury:

It becomes my duty as Judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and

weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you.

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against either party to the action.

2. In civil actions the party who asserts the affirmative of an issue must carry the burden of proving it. In other words, the "burden of proof" as to that issue is on that party. This means that if no evidence were given on either side of such issue, your finding as to it would have to be against that party. When the evidence is contradictory, the decision must be made according to the preponderance of evidence, by which is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies [366] therein. Should the conflicting evidence be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue.

3. It appears from the evidence that plaintiff and defendant, R. P. Hill, undertook as co-sponsors to obtain from the Federal Housing Administration a commitment for a loan with the understanding that, should the commitment be granted, the plaintiff was to build a building for the defendant. It also

appears from the evidence that the commitment sought by the parties was granted, and that because of a disagreement between the parties the plaintiff did not build the building for which this commitment was obtained.

It is the contention of the plaintiff that his failure to build the building was the fault of the defendant, and it is the contention of the defendant that the failure of the plaintiff to build the building was the fault of the plaintiff. It is for you to determine from all of the evidence who was actually at fault.

If you should find from a preponderance of the evidence that the defendant was at fault, that both parties were equally at fault, or that neither was at fault, you [367] will return a verdict in favor of the plaintiff, and if you do not so find you will return a verdict in favor of the defendant.

If you find in favor of the plaintiff you will return a verdict in favor of the plaintiff for the value of the benefit which the defendant received as a result of the plaintiff's services and expenditures.

4. It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when you are convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them

favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the purpose of returning a verdict or solely because of the opinion of the other jurors.

5. You shall not consider as evidence any statement [368] of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of fact or facts.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the Court; such matter is to be treated as though you never had known of it.

You are to decide this case solely upon the evidence that has been received by the Court, and the inferences that you may reasonably draw therefrom, and in accordance with the law as I state it to you.

6. If and when you should find that it was within the power of a party to produce stronger and more satisfactory evidence than that which was offered on a material point, you should view with distrust any weaker and less satisfactory evidence **actually** offered by him on that point.

7. You are admonished to view with caution the testimony of any witness which purports to relate the oral admission of a party litigant.

8. You are not bound to decide in conformity with the testimony of a number of witnesses, which does not [369] produce a conviction in your mind, as against the declarations of a lesser number of other evidence which appeals to your mind with more convincing force.

This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing side. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

9. If in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and are to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

10. If during this trial I have said or done anything [370] which has suggested to you that I favor the claims or position of either party, you will not suffer yourself to be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are, or are not worthy of belief; what facts are, or are not, established; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion

relating to any of these matters, I instruct you to disregard it.

11. The jury are the sole and exclusive judges of the effect and value of evidence addressed to them and of the credibility of the witnesses who have testified in the case. The character of the witnesses, as shown by the evidence, should be taken into consideration for the purpose of determining their credibility, whether or not they have spoken the truth. The jury may scrutinize the manner of witnesses while on the stand, and may consider their relation to the case, if any, and also their degree of intelligence. A witness is presumed to speak the truth. The presumption, however, may be repelled by the manner in which he testified; his interest in the case, if any, or his bias or prejudice, if any, against one or any of the parties; by the character of his testimony. [371]

The impeachment of a witness in any of the ways I have mentioned does not necessarily mean that his or her testimony is completely deprived of value, or that its value is destroyed in any degree. The effect, if any, of the impeachment upon the credibility of the witness is for you to determine.

A witness wilfully false in one material part of his or her testimony is to be distrusted in others. The jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; if you are convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or inadvertence, but wilfully and with the design to deceive, then you

may treat all of his or her testimony with distrust and suspicion, and reject all unless you shall be convinced that he or she in other particulars sworn to the truth.

12. Upon retiring to the jury room you will select one of your fellow jurors to act as foreman, who will preside over your deliberations and who will sign the verdict to which you agree. In order to return a verdict it is necessary that all twelve of the jurors agree to the decision.

If you find for the plaintiff your foreman will insert into verdict No. I the amount of the verdict found for plaintiff and then date and sign that verdict. [372]

If you find for the defendant your foreman will date and sign verdict No. II.

As soon as all of you have agreed upon the verdict you shall have it signed and dated by your foreman and then return with it to this room.

Dated at Fairbanks, Alaska, this 4th day of August, 1955.

/s/ Vernon D. Forbes, District Judge

(At the conclusion of the Clerk of Court reading the Court's instructions to the jury, the following proceedings were had):

The Court: Will counsel approach the bench?

(Thereupon, the attorneys approached the bench and the following proceedings were had out of the hearing of the jury):

The Court: Gentlemen, before I hear from you

concerning your exceptions, I note the defendant Mary Hill still carried as a defendant in the verdict, and I think that it would be proper for me to strike therefrom, "and Mary Hill" and instruct the jury, that is inform the jury. Is there any objection to that?

Mr. McNealy: No objection, your Honor.

The Court: It is proper. Well, we can at this time conclude to take the exceptions, if any, to the instructions [373] of the Court.

Mr. McNabb: Do you have any objections?

Mr. McNealy: I have no objections. The plaintiff has none.

Mr. McNabb: Your Honor, the record will show that I have previously objected to Instruction No. 3, that is my previous objection was addressed to that which is now No. 3.

The Court: That's right.

Mr. McNabb: And I wish that objection to stand.

The Court: It will so stand.

(Thereupon, the attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury):

The Court: Members of the jury, at the conclusion of the evidence in this case the Court dismissed the action insofar as the defendant Mary Hill is concerned and the verdicts were prepared prior to that dismissal and therefore I am changing the verdicts merely by striking out the words, "and Mary Hill" and making singular of the word defendants by striking out the "s". I merely state that

as an explanation for you. Now, will the Clerk, please, explain the duties and qualify the bailiffs.

[Endorsed]: Filed December 1, 1955.

[Endorsed]: No. 14982. United States Court of Appeals for the Ninth Circuit. R. P. Hill and Mary Hill, Appellants, vs. A. E. Waxberg, doing business as Waxberg Construction Company, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Fourth Division.

Filed: December 22, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14982

R. P. HILL and MARY HILL,

Appellants.

vs.

A. E. WAXBERG, d/b/a Waxberg Construction
Co., Appellee,

STATEMENT OF POINTS ON APPEAL

Appellants having heretofore filed in the District Court for the District of Alaska, Fourth Division, a statement of points to be relied on on this appeal, said statement is hereby adopted by reference.

Dated at Fairbanks, Alaska, this 16th day of January, 1956.

/s/ GEORGE B. McNABB, JR.,
Attorney for Appellants

Acknowledgment of Service attached.

[Endorsed]: Filed January 23, 1956. Paul P. O'Brien, Clerk.